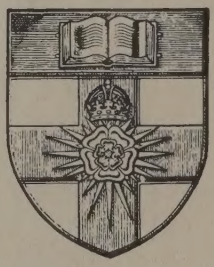
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346
Hx North Gall.



UNIVERSITY OF LONDON
LIBRARY

THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JANUARY 13, 1919, TO MARCH 16, 1920.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XIV.

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE.

TORONTO:

THE CARSWELL CO., LIMITED.

SYDNEY, N.S.W.:

LAW BOOK CO. OF AUSTRALASIA, LIMITED.

1920.

This Volume should be cited as 14 Cr. App. R.

BIBL. LONDIN. UNIV.

INDEX OF APPELLANTS' NAMES.

PAGE

Bartlett, Alfred 157
Beard, Arthur..... 110, 160
Bell, George 36
Bennett, William Charles..... 35
Biggin, Arthur John..... 87
Bolam, Alfred..... 120
Bradberry, Alfred..... 157
Bratherton, Donald 74
Burke, John 127

Carruthers, John Dudley..134, 138
Casey, John..... 100
Creamer, Wilbert Roy Gordon... 19

Daniel, Archibald Gordon 15

Eling, Alfred..... 24

Feigenbaum, Marks..... 1
Ferrua, Joseph H..... 39

PAGE

Graham, Alexander..... 7
Green, Samuel 157

Hall, Harry 58
Hammersley, Willie 118
Harper, Joseph 133
Higgins, Frederick 28
Holt, Frederick Rothwell..... 152
Horsenail, Frederick..... 58
Humphreys, Sidney Alfred 85

Jackson, William..... 41
Johnson, Harold 100
Jones, George William..... 70

Kingsland, Horace George..... 8

Lenton, Robert..... .. 105
Lewis, Albert Edward 33
Lingley, Samuel..... 58

	PAGE
MacFarlane, Robert	155
Mason, Arthur E.	126
Matthews, Arthur	23
Monkhouse, Edward	38
Morton, George Edward, *alias* Ernest Shaw	37
Mullarkey, Michael	44
Oxlade, Stanley	65
Paul, James	155
Perry, Henry	48
Power, Joseph	17
Quartermaine, Albert Edward	109
Ratcliffe, Harry	95
Rose, Joseph	14
Sanders, Albert	11
Sanders, Edgar Wentworth	9
Saye, Lewis	123
Shadforth, William	77
Shaffner, Lazarus Morris	131
Shephard, Percy Parker	26
Smellie, George	128
Smith, Benjamin Myro	74, 81
Smith, Sidney Edward	101
Stanford, Samuel	73
Stanley, George	141
Tate, Albert Henry	103
Tidey, Jane	32
Twigg, William James	71
Wakeley, Charles	121
Wallbridge, William	24
Warren, Harold	4
Wheatley, Arthur	124
Williams, Alfred	135
Williams, John Thomas	107
Wilson, John	77
Wood, Charles	149
Woodley, Albert	135

TABLE OF CASES CITED.

[*The letters* "R. v." *in criminal cases are omitted.*]

	PAGE
Baggott	119
Baines (1886)	194
Baskerville (1916)....5, 6, 76, 82, 122	
Biggin	99
Bottomley	112
Brain (1918)	12, 13
Bridgwater (1905)	89
Brown, B. (1910)	82
Browne, Mary (1906)	129
Bundy (1916)	30
Burrows (1823)... 168, 170, 181, 189, 193	
Caldwell (1911)	14
Carroll (1835)	170, 189
Chapman (1910)	175
Christie (1914)	2
Chudley *v.* Chudley	20
Cratchley (1913)	6
Crossley (1837)	10
Chadwick, &c. (1917)	30
Cohen and Bateman (1909)...30, 135, 137	
Collins (1916)	145
Crisp (1912)	175
Cruse (1837)	172, 182, 196
Davis, W. (1881)	178, 193
—— (1917)	142—7
Dimes, C. (1911)	76, 82
Doherty (1877)	172, 191, 192
Doody (1854)	172
Drew *v.* Drew (1888)	20
Ellis (1910)	88, 99
Everest (1909)	5
Felstead (1914)	193
Finch (1916)	30
Fletcher (1845)	112
Fletcher (1845)	179
Franz (1861)	179
Fraser (1911)	18
Friedman (1914)	132
Galbraith (1912)	173
George (1908)	18
Goodier (1831)	181, 190
Graham (1910)	76, 81
Griffiths (1913)	180
Grindley (1819) ...170, 172, 181, 189	
Hadwen	156
Harding, Ethel (1908)	193 (note)
Hart, Willie (1914)	75
H.M.'s Advocate *v.* J M'Donald (1890)	168, 178
Honeyands (1914)	175
Hopper	112, 115
Horsey (1862)	111, 113, 172, 179
Hudson, B. (1912)	90, 93
Huggins	129

	PAGE
Jackson (1918)	12, 13
James (1902)	19
Joiner (1910)	17, 18
Kenrick (1843)	11
King, T. E. V. (1914)	14, 20
Ladd (1773)	112, 179
Letenock (1917)	184
Lillyman	82
Livock (1914)	14
Lovett	129
Luck (1862)	179
Lumley (1911)	112, 172, 180
M'Donald, J. (1890)	168, 178
Macdonell (or Macdonald) (1909)	156
McNaughton (1843)	164, 165, 176, 181, 197, 198
Malvisi (1909)	14
Marshall (1830)	181, 182, 189
Marshall *v.* Malcolm (1917)	20
Martin (1910)	119
Mathieson (1906)	175
Meade (1909)	110, 112, 116, 117, 159—198
Meakin (1836)	171, 190
Monk, A. W. (1912)	82
Monkhouse (1849)	172, 191
Moore (1852)	178, 197
Nicholls, Mary	59, 64
Norton (1910)	2
Osborne (1905)	82
Pearson (1835)	171, 182, 190
—— (1908)	18
Preston, J. (1909)	88, 89, 94
Pywell (1816)	10, 11
Rennie (1825)	171, 177, 181, 189, 193
Renniger *v.* Fogossa (1562)	182, 188
Robinson, W. J. (1917)	14
Rodley	92
Rubens (1909)	14
St. George	129
Schama, &c. (1914)	12, 33
Scholey (1909)	173
Serné	112, 171, 180, 192
Smith, J. H. (1913)	65
Stoddart (1909)	12, 82
Stopford (1870)	172, 191
Streek	129
Tate (1908)	2
Thomas (1837)	182, 190
Trevarthen (1912)	14
Weldon *v.* Neal	121, 122
Westfall	89
Wheatley (1761)	10
Whitmarsh	112, 172

TABLE OF STATUTES.

PAGE

1861 24 & 25 Vict. c. 100 (The Offences against the Person Act, s. 4)..26, 27
1882 45 & 46 Vict. c. 75 (The Married Women's Property Act), ss. 12, 16 20
1885 48 & 49 Vict. c. 69 (Criminal Law Amendment Act), s. 5.....121, 122
1898 61 & 62 Vict. c. 36 (Criminal Evidence Act),
s. 1... .....155, 156
s. 1 (*f*) .....95—99, 149, 150
s. 1 (*f*) (ii) .....87—94
c. 60 (Inebriates Act), s. 1 (1)..... 175
1904 Prevention of Cruelty to Children Act, s. 27 121
1907 7 Edw. 7, c. 23 (The Criminal Appeal Act),
s. 4 (1), proviso 13, 87, 95, 110, 135
s. 9 (a)..... 58
(d).....152—154
1908 8 Edw. 7, c. 59 (The Prevention of Crime Act),
s. 1 (1) (b) 67
s. 10 (2) .....141—147
1913 3 & 4 Geo. 5, c. 27 (The Forgery Act), s. 7 (a) .....101—103
1916 6 & 7 Geo. 5, c. 50 (The Larceny Act), s. 36 .....19—22, 32
1917 7 & 8 Geo. 5, c. 21 (The Venereal Diseases Act), ss. 1, 2 .....77—80

CORRIGENDUM:

Page 85—*4th line from bottom:* transfer "that" to next line before "a threat."

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

MARKS FEIGENBAUM.

Severity of sentence.
Non denial of an accomplice's incriminating statement may be corroboration.

1919
13 *January.*

Appeal against conviction on a point of law.

The appellant was convicted on December 6th, 1918, before the Deputy-Chairman, at the London Sessions, of larceny and of conspiracy, and was sentenced to four years' penal servitude and recommended for expulsion.

J. A. C. Keenes for the appellant: The appellant, a carman, was convicted of conspiring with various others, some unknown, to steal horse fodder from carts in the street; inciting others to steal such horse fodder; stealing and receiving a sack of horse fodder, the property of a person unknown; and stealing a sack of horse fodder the property of R. Cornell, Ltd. At the trial a police constable gave evidence of the arrest of three lads on a charge of stealing a sack of horse mixture. They were bound over at the police-court. He deposed that he afterwards visited a shop kept by the prisoner, and said to him, "I am going to arrest you as an accessary." The prisoner said, "what do you mean?" The constable replied, "I have arrested three lads to-night," mentioning their names, "whom I saw stealing from a van a sack of horse mixture, and they say you sent them out for it, and that on Monday night, the Monday previous, they stole a sack of horse provender, and you gave them a shilling for it, and on the Friday previous for stealing some provender that you gave them sixpence." The Deputy-Chairman asked what the appellant said, and the constable answered, "He made no reply." The appellant was taken to the police station, and the

1919
13 *January.*
MARKS FEIGENBAUM.
Darling J.
Avory J.
Shearman J.

lads' statements were then read over to him in the presence of the lads, and according to the constable's evidence the appellant made no reply, and the officer who read the statements did not remember that the appellant made any reply. The Deputy-Chairman, in his summing up, told the jury that he thought they were entitled, if they considered the evidence of the constable to be accurate, to ask themselves whether there was not, in fact, corroboration of the story of, at any rate, three of the boys. It is submitted that the Deputy-Chairman was wrong in directing the jury that a non-denial of the charge by the appellant when arrested was in itself corroboration of the evidence of accomplices. The silence of the appellant when charged was not corroboration of the accomplices. He referred to *Tate*, 1908, 2 K. B. 680; 77 L. J. K. B. 1043; 99 L. T. 620; 72 J. P. 391; 21 Cox C. C. 693; 1 Cr. App.R.30.

AVORY J.: Does not *R.* v. *Christie*, 1914, A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 24 Cox C. C. 249; 10 Cr. App. R. 141, shew that the Deputy-Chairman was right in leaving it to the jury to say whether the prisoner's silence amounted to corroboration?

Percival Clarke (with him *Roland Oliver*) for the respondents: The Deputy-Chairman's direction was right. There are *dicta* in *Norton*, 5 Cr. App. R. 65, 1910, and *Christie*, in the House of Lords, which clearly lay down that failure to reply in circumstances in which a man might be reasonably expected to reply to a charge, may be evidence against him. If this is evidence against him, it must also be corroboration, if it tends to confirm the accomplices' story.

DARLING J.: In this case the boys were undoubtedly accomplices. In strict law the jury may convict on the uncorroborated evidence of accomplices; and it is because I think they may do so, that the judge would not be justified in saying at the end of the case for the prosecution, "I direct you to acquit, because the evidence is that of accomplices, and there is no evidence of corroboration." The result of the cases on this subject is, that the judge ought not to leave the jury to convict on the uncorroborated evidence of accomplices without warning them of the danger of convicting on such uncorroborated evidence. He must not direct

1919
13 *January*.

MARKS
FEIGENBAUM.

Darling J.

them not to convict, but must warn them that the evidence of accomplices is a grave matter, and that a juryman desiring to do his duty ought not to convict if the evidence is uncorroborated, without very serious consideration of that fact. The judge ought to point out the evidence of corroboration, if such exists, and what it is; and also to point out that there is no corroboration if that is the case. This process differs very much from a direction by the judge that the jury are not to convict on the uncorroborated evidence of accomplices. The Deputy-Chairman here gave the right direction; and it is not necessary to go over all the expressions he used; but as the result of our consideration of those expressions, we arrive at the conclusion that he directed them rightly on the danger of acting on the uncorroborated testimony of accomplices, and on the nature of the corroboration by the accomplices in this case. If he had said there was no corroboration he would have been wrong. It amounted to this, that the prisoner was charged with inciting the boys to steal; he was told specifically with what he was charged, and he was told the names of the boys whose detailed statement was read to him; and in these circumstances he said not one single word. It appears to us that the Deputy-Chairman would have misdirected the jury if he had told them there was no corroboration of the boys' evidence. We think there was no ground whatever for saying that there was any misdirection, and the appellant was rightfully convicted.

The appellant was sentenced to four years' penal servitude, and was recommended for deportation. We think we ought not to interfere with the recommendation. With regard to the sentence of penal servitude, however, the appellant has never before been convicted. If it had not been for his inciting young boys to crime the ordinary sentence in such a case would have been probably one of about eighteen months. In the circumstances we reduce the appellant's sentence to one of three years' penal servitude.

Sentence reduced.

Solicitors—*Messrs. G. B. Howard & Son* for Appellant; *Wontner & Sons* for respondents.

G. H. K.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

1919
20 *January.*

HAROLD WARREN.

The Court will allow evidence to be given, which might have been given at the trial, if it is satisfied that the omission was due to a misunderstanding on defendant's part.

Appeal against conviction and sentence by leave of Mr. Justice Avory.

Application for leave to call further evidence.

The appellant was convicted on December 12th, 1918, at the Central Criminal Court, before Mr. Justice Rowlatt, of sodomy, and was sentenced to seven years' penal servitude.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant asks leave to call further evidence, on the ground that there was a *bonâ fide* mistake on his part. In conference before the trial the appellant desired to call medical evidence and evidence to support an alibi. This was considered, and it was ultimately decided not to call evidence, with the possible exception of evidence of character. Both counsel and solicitor understood that the appellant acquiesced in this decision. The appellant, however, subsequently stated that he thought that the matter was not finally decided at the conference. At the conclusion of the prisoner's evidence, counsel said that he had intended to call a number of witnesses to character, but as the evidence had come to an end earlier than was expected the witnesses were not there. Mr. Justice Rowlatt then offered to adjourn the case to enable further evidence to be called, but it was decided not to call any evidence of character. The appellant then demanded an opportunity to call other evidence, saying that he was told that the

1919
20 *January.*

HAROLD WARREN.

Darling J.
Avory J.
Salter J.

case would last probably three days, and that he would not need any witnesses until the second day. The appellant, however, acquiesced in counsel's decision, but he subsequently said that he only intended to acquiesce in the decision so far as it applied to evidence of character.

DARLING J.: It does not appear to the Court that there was a misunderstanding. The appellant thought that his acquiescence applied to witnesses of character only. We will allow the two witnesses who are in court to be called, but we shall not allow an adjournment.

Leslie Vincent, who had been a pupil in the appellant's school, gave evidence in support of an *alibi*.

Dr. William Hunter Duncan, M.A., B.M., B. Surgery, practising at 21, Clapham Common, gave medical evidence. He said that the signs of bruising and other signs which he would expect to see if the offence had been committed were absent.

E. J. Purchase: The case for the prosecution depends upon the uncorroborated evidence of an accomplice, and the question arises whether the jury were entitled to convict upon such evidence. See *Baskerville's* case, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. Rep. 453; 80 J. P. 446; 60 Sol. Jo. 696; 12 Cr. App. R. 81, 1916; and *Everest's* case, 2 Cr. App. R. 130, 1909. No proper warning was given by the judge in his summing up to the jury of the danger of convicting the appellant upon the uncorroborated testimony of any accomplice. See *Baskerville's* case. The conviction ought to be quashed.

E. Percival Clarke for the Crown. The test is whether the so-called accomplice was an accomplice in the sense that he could be charged and convicted of the offence. The "accomplice" here was a boy of thirteen. Even if he was an accomplice in the sense that he could be convicted of the offence a sufficient warning was given to the jury as required by *Baskerville's* case.

DARLING J.: The appellant was charged with committing sodomy. There were other counts charging him with attempted indecent assault. He was convicted of the full offence of sodomy.

The conviction is attacked on the ground that it depended upon

1919
20 *January.*

HAROLD WARREN.

Darling J.

the evidence of an accomplice which was uncorroborated. The accomplice was a boy of thirteen, and whether or not the boy was an accomplice in the sense that he could be charged with the offence we think that the judge ought to have warned the jury against acting on the evidence of an accomplice, and also a warning should have been given to them against acting on the evidence of a boy of that age. Nevertheless, if from the conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it will not interfere. (See *Cratchley's* case, 9 Cr. App. R. 232, 1913.)

In the present case the Court is of opinion that the judge has given the caution against accepting, without corroboration, the evidence of this boy, and it is sufficient to say that no fault can be found with the summing up on that ground.

We find, however, that the medical evidence given at the trial was not such as we should have expected if the full offence had been committed. Even without the evidence of Dr. Duncan (who was called to-day) we should have come to the conclusion that the jury ought not to have convicted the appellant of the full offence of sodomy. We are still more of that opinion, having regard to the evidence of Dr. Duncan given to-day.

It was laid down in *Baskerville's* case that the Court, in the exercise of its powers, will quash a conviction even when the judge has given the jury the warning or advice referred to if the Court, after considering all the circumstances of the case, thinks the verdict unreasonable or that it cannot be supported having regard to the evidence. Acting upon our view of the evidence, we shall quash the conviction for the full offence as not being warranted by the evidence. A conviction for an attempt must be substituted for the conviction for the full offence.

Then the question arises what the proper sentence is to be, and we think that the sentence should be reduced to one of three years' penal servitude.

Conviction of attempt substituted. Sentence reduced.

T. W. M.

ALEXANDER GRAHAM.

1919
20 *January.*

When two or more persons are jointly indicted the direction must carefully distinguish between the case of each, and it is a grave misdirection to suggest wrongly that if one is guilty another must also be guilty.

Appeal against conviction.

The appellant was convicted, on December 16th, 1918, at the Central Criminal Court, before Mr. Commissioner Atherley-Jones, of gross indecency with a male person, and was sentenced to fourteen days' imprisonment in the second division.

J. Peury Oliver for the appellant, who was not in custody.

Horace Fenton for the respondents.

Avory J.: The appellant was convicted of gross indecency. He and a man named Alex. Gordon were charged on indictment with gross indecency. The appellant was charged with committing, or being a party to the commission, or attempting to procure the commission of an act of gross indecency with Alex. Gordon. Gordon was also charged with having committed an indecent assault upon the appellant, and there was a general verdict of guilty on the whole indictment. A possible view of the case was that Gordon had followed the appellant and has committed the indecent assault upon him with the ulterior purpose of extorting money. In these circumstances it is clear that that view ought to have been put before the jury in the summing up. In his summing up to the jury the learned Commissioner said: "All your duty is to say, aye or no, do you think that evidence sufficient to warrant you in finding these two men guilty, because if one is guilty both are guilty." In our opinion that was a clear misdirection. It left the jury no option but to find that both men were guilty or both not guilty. The conviction must be quashed.

Conviction quashed.

Solicitors—*W. H. Armstrong & Co.* for the Appellant; *Wontner and Sons* for the respondents.

T. W. M.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE HORRIDGE.

1919
27 January.

HORACE GEORGE KINGSLAND.

The police are justified in shewing photographs of a person whom they suspect with a view of getting information, and evidence that they had a photograph of defendant may be given at his trial.

Application for leave to appeal against conviction and sentence.

The applicant was convicted on December 13th, 1918, at the Central Criminal Court, before the Common Serjeant, of larceny, and was sentenced to three years' penal servitude.

The applicant did not appear.

The Crown was not represented.

DARLING J., in the course of his judgment, said: The applicant pawned the jewellery which he has been found guilty of stealing. His counsel, when cross-examining the pawnbroker, elicited the fact that the police had called on him (the pawnbroker) and shewed him a number of photographs, from which he selected one as being that of the applicant. The applicant complains that that evidence was improperly admitted, as it shewed he was known to the police, who otherwise would not have had a photograph of him. Nothing of the sort. It did not follow that the photographs were photographs of convicted persons. The police have a duty in investigating these matters, and in executing that duty they have to deal with photographs, as in this case. What they did here was in every way proper.

Application dismissed.

G. B.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

EDGAR WENTWORTH SANDERS.

1919
3 *February.*

Objections to the admission of evidence must be taken when the evidence is tendered.
An indictment for obtaining by false pretences may lie on a breach of warranty.
Observations on Pywell, 1 *Stark.* 402, 1816.

Appeal against conviction on a point of law.

The appellant was convicted on January 1, 1919, before the Chairman, at Dorset County Sessions, of obtaining a cheque by false pretences, and was sentenced to twelve months' imprisonment with hard labour.

Sir Ernest Wild, K.C., and *H. W. Wickham* for the appellant, who was present. Appellant was convicted of obtaining a cheque for £70 by false pretences in respect of two mares which he sold to the prosecutor, who paid him the cheque, relying on certain representations, among others that the mares were in foal. The prosecutor said that the mares were not in foal, and that in other respects they were not up to the warranty given by the defendant. The grounds of the appeal are (1) that there is no evidence at all that the property in the £70 was obtained by false pretences. On the date when the prosecutor paid the cheque the property in the £70 did not pass to the defendant, nor did the property in the mares pass to the prosecutor. The defendant had stipulated that the mares were to be returned if not approved by the prosecutor. If A. takes from B. property on sale or return, the property does not pass until the end of the probationary period.

1919
3 *February.*

EDGAR WENTWORTH SANDERS.

Bray J.
Avory J.
Sankey J.

The second ground of appeal is that there was not sufficient evidence that appellant knew that the representations were false.

The third ground is the misreception of evidence. Certain letters from the prosecutor to the appellant were tendered in evidence though no notice to produce them had been given. Objection was taken. The prosecution obtained the purport of the letters from the witnesses.

The fourth ground is that there can be no prosecution for false pretences based on a breach of warranty. See *Pywell and others*, 1 Starkie, 402, 1816, *per* Lord Ellenborough. The headnote is as follows: "An indictment will not lie for a deceitful representation and warranty of the soundness of a horse."

[AVORY J.: That case turned on the conspiracy. It says that there was no evidence of any concert between the man who said that the horse was sound and the man who signed the receipt.

SANKEY J.: I am not sure that the headnote is right.

AVORY J.: I am sure it is not.]

In *Wheatley*, 2 Burr. 1125, 1761, it was held by Lord Mansfield that delivering less beer than contracted for as the due quantity was not indictable.

Keighley, 7 Cox C. C. 217, 1856, was also cited.

Randolph A. Glen, for the Crown, referred the Court to *Crossley*, 2 M. & Rob. 17, 1837, during the argument for the appellant, but was not called on to reply.

BRAY J.: With regard to the objection in respect of the misreception of evidence, although objection was successfully taken, during the opening speech of counsel for the prosecution, to the letters being given in evidence, it does not appear that objection was taken when evidence of the purport of the letters was given. In my opinion the objection ought to have been taken at that time, and as it was not then taken, it cannot now be entertained by this Court.

It has been objected that an indictment for false pretences based

1919
3 *February.*

EDGAR WENTWORTH SANDERS.

Bray J.

on a breach of warranty would not lie: *Kenrick*, 5 Q. B. 49; 12 L. J. (N. S.) M. C. 135; 1 Dav. & M. 208, 1843, is to the contrary.

Counsel relied on *R.* v. *Pywell*, 1 Starkie, 402, 1816. The headnote says that "an indictment will not lie for a deceitful representation and warranty of the soundness of an horse." But when the case is looked at, it does not amount to that. The indictment was for a conspiracy to cheat and defraud by selling an unsound horse, and Lord Ellenborough said that the case did not assume the shape of a conspiracy, and that no such indictment in such a case could be maintained without evidence of concert between the parties to effect a fraud. The headnote of that case is wrong.

After dealing with the remaining points raised in argument, Bray J. said there was no ground for setting aside the verdict.

Appeal dismissed.

Solicitor for Appellant—*H. Percy Crowe.*

T. W. M.

ALBERT SANDERS.

On indictments for receiving with guilty knowledge the onus *never rests on the defendant.*

Appeal against conviction and sentence, by leave of McCardie J.

The appellant was convicted on January 2, 1919, before the Chairman, at Northampton County Sessions, of receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour.

H. D Roome for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The conviction ought to be quashed on the ground of misdirection. The learned Chairman, in summing up, told the jury that "if a person is found in possession of property recently stolen it is his business to shew that he came honestly by it, and it is not for the prosecution to shew

1919
3 *February.*

ALBERT SANDERS.

Bray J.
Avory J.
Sankey J.

that he did not. The *onus* of proof is put on the prisoner." That was a misdirection; see *Isaac Schama and Jacob Abramovitch*, 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 31 T. L. R. 88; 11 Cr. App. R. 45, 1914; and it was so serious a misdirection that the proviso of s. 4 of the Criminal Appeal Act, 1907, ought not to apply. See *William Brain*, otherwise *Jackson*, 13 Cr. App. R. 197, 1918.

P. E. Sandlands for the Crown. If the case for the Crown rested on any presumption of guilt due to recent possession of stolen property, the direction could not be supported. The case for the Crown was based on direct evidence of receipt of stolen property by the prisoner from the thief together with evidence that the prisoner attempted to obliterate marks by which the property could be identified. In these circumstances that part of the summing up complained of was irrelevant. In any event the proviso ought to apply, having regard to the special circumstances here.

SANKEY J., after summarising the facts, continued: The appellant did not cross-examine the witnesses for the prosecution, nor did he give evidence himself. The ground of the appeal is misdirection. The Chairman, in summing up, said: "The prisoner is charged with receiving certain leather and grindery, well knowing it to have been stolen. As a rule the law of England presumes that a person is innocent until he is found guilty, but in this particular charge of receiving stolen property the law is very different, because if a person is found in possession of property recently stolen it is his business to shew that he came honestly by it, and it is not for the prosecution to shew that he did not. The *onus* of proof is put on the prisoner to shew that he came honestly by this property, and if you are satisfied that this property found in the prisoner's possession was come by dishonestly, and he has not given you a satisfactory explanation, it is your duty to say that he is guilty of the charge."

Now, it is not denied that that is a misdirection. In *Schama and Abramovitch* Bray J. said, during the argument, that "In *Stoddart*, 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612; 2 Cr. App. R. 241, 1909, to which judgment I was a party, we meant

1919
3 *February.*

ALBERT SANDERS.

Sankey J.

to decide that the *onus* of proof never changes. A jury ought never to be told that they must convict the prisoner because no explanation has been given by him." The Lord Chief Justice, in giving judgment in that case, said: "That *onus* never changes; it always rests on the prosecution."

It is admitted by counsel that this is a misdirection, but it is said that the Court ought to take advantage of the proviso to s. 4 of the Criminal Appeal Act, 1907, which says that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. The question is, can the Court say that the jury would have come to the same conclusion after a proper direction? This question must be answered in the affirmative, before the proviso to s. 4 can be applied. The misdirection in this case goes to the root of the question. It placed the *onus* on the wrong person. A similar question came before the Court in *William Brain*, otherwise *Jackson*, 13 Cr. App. R. 197, 1918, and Avory J., in giving judgment, said: "That seems to this Court to be so serious a misdirection that we cannot act under the proviso to s. 4 of Criminal Appeal Act, 1907, and say that in spite of it no substantial miscarriage of justice has occurred."

We are unable to say that in spite of the misdirection in this case, no miscarriage of justice has occurred. The appeal, therefore, succeeds, and the conviction must be quashed.

Conviction quashed.

T. W. M.

1919
3 *February.*

Bray J.
Avory J.
Sankey J.

JOSEPH ROSE.

The rule of the Court is not to hear appellants who did not give evidence below.

Application for leave to appeal against conviction, and to call further evidence.

Applicant was convicted, at the Berkshire Assizes, on January 16th, before Rowlatt J., of murder, and was sentenced to death.

The Honble. *Reginald Coventry* for applicant (under s. 10 of the Criminal Appeal Act), who was present. In my discretion I did not call applicant at the trial. Had I known that the learned judge would comment so strongly on this, I would have done so. He wishes to tell his own story, which is that the deceased and he (his throat having been cut) were victims of another man, whom he saw; and to explain other matters.

Lort-Williams, for the Crown, was not called upon.

Bray J.: The rule of this Court is that it will only hear an appellant who did not give evidence at the trial in very exceptional circumstances; otherwise defendants would take their chance of not being witnesses below. See *Malvisi*, 2 Cr. App. R. 192, 251, 1909; *Rubens*, 2 Cr. App. R. 167, 1909 (murder); *Caldwell*, 6 Cr. App. R. 151, 1911; *Trevarthen*, 8 Cr. App. R. 97, 1912; *T. E. V. King*, 10 Cr. App. R. 44, 1914; *Livock*, 10 Cr. App. R. 264, 1914. There is hardly any instance of an appellant not called below giving evidence here, and none in a murder case except the wholly exceptional case of *W. J. Robinson*, 12 Cr. App. R. 226, 1917.

Application dismissed.

BEFORE

MR JUSTICE BRAY, MR. JUSTICE LUSH, AND MR. JUSTICE SANKEY.

ARCHIBALD GEORGE DANIEL. 1919 10 *February.*

Severity of sentence to detention in a Borstal institution.

Appeal against sentence.

The appellant was convicted, on January 1st, at the Essex Quarter Sessions, of shop-breaking, and was sentenced to two years' detention in a Borstal institution.

The *Appellant* in person.

The Crown was not represented.

BRAY J.: Daniel was the eldest of three boys who committed this shop-breaking. His age is about 17. Wilkins, one of the other boys, had been convicted twice before, and the sentence passed on him of three years' Borstal detention was a perfectly proper one. Daniel had not been convicted previously, and when he was sentenced no recommendation had been received with regard to his treatment from the Prison Commissioners. After the case was concluded, however, a report was received from the Governor of Pentonville Prison, where he was detained, which was as follows:—

Report on fitness for Borstal treatment.

Not recommended. He has not been charged or convicted before, although the police report he has been suspected. Probably a sentence under the modified Borstal system would meet the case, and separate him from his bad companions.

1919
10 *February.*

ARCHIBALD GEORGE DANIEL.

BRAY J.

It appears, however, to us that Daniel, the oldest of these boys, was leading the others astray. His father, moreover, stated that he could not altogether keep him under control. In all the circumstances we think the sentence should stand. Under the Borstal system, after about six months cases are reconsidered, and if the appellant behaves himself properly and shews he is prepared to earn an honest livelihood, he may be released then. If we could not send him to a Borstal institution we should have to send him to prison for three or four months. We think it better in the appellant's interests that the sentence should remain unaltered.

Appeal dismissed.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, MR. JUSTICE LUSH, MR. JUSTICE SHEARMAN, AND MR. JUSTICE SANKEY.

JOSEPH POWER.

1919
24 *February.*

Though counsel for defendant has submitted at the proper stage that there is no case to go to the jury, yet, if he takes part in the subsequent proceedings, he cannot, on appeal, rely on that: Joiner, 4 *Cr. App. R.* 64, 1910, *is overruled on this point.*

Appeal against conviction and sentence.

The appellant was convicted on January 14th, 1919, before Mr. Commissioner Rentoul, at the Central Criminal Court, of receiving with guilty knowledge, and was sentenced to twelve months' imprisonment in the second division. Lewis, a co-defendant, was also convicted, and appealed, but withdrew his appeal.

Fox-Davies for the appellant, who was present. At the trial, at the close of the case for the prosecution, I submitted that there was no case to go to the jury. Mr. Commissioner Rentoul decided against the submission, and the proceedings continued. Lewis, the co-defendant of the appellant, went into the witness-box and gave evidence against the appellant. It is submitted that the ruling of the Commissioner was wrong, and that there was no case to go to the jury, and that, in view of my submission, this Court, in considering this matter, cannot utilise the evidence given after I had made that submission to supplement the testimony given for the prosecution: *Joiner*, 4 Cr. App. R. 64; 74 J. P. 200; 26 T. L. R. 265, 1910. There was no direction on the question whether appellant knew that the property was stolen, nor on the explanation which he gave. Indeed, this defendant was not even mentioned, so that nothing was said whether Lewis's statements

1919
24 *February.*

JOSEPH POWER.

Darling J.
Avory J.
Lush J.
Shearman J.
Sankey J.

against appellant were evidence or not, in fact, the only direction was in Lewis's case.

Eustace Fulton for the Crown: At the trial counsel for the appellant, after submitting "no case," cross-examined the defendant Lewis, called his own client, and took part in the proceedings. In these circumstances the subsequent evidence can be considered by this Court: *Fraser*, 7 Cr. App. R. 99; 76 J. P. 168, 1911.

DARLING J.: In this case counsel for the defence at the trial submitted when the case for the prosecution had closed that there was no case to go to the jury. Mr. Commissioner Rentoul, however, left the case to the jury. The man Lewis, who was indicted with the appellant, was then called as a witness, and counsel for the appellant cross-examined him. The Court is of opinion that the rule laid down in *Fraser's* case is the right one. The decisions of the Court on this matter have not been altogether in accord. In *Joiner* a rule was laid down different from that which the Court is laying down to-day. Lord Alverstone, in *Fraser*, said: "Where an objection is taken by counsel unsuccessfully, and he then calls evidence, this Court is not bound to disregard the effect of that evidence." He then said that the Court was not prepared to follow *Joiner* (above), but preferred the reasoning in *Pearson*, 1 Cr. App. R. 77; 72 J. P. 449, 1908; and *George*, 1 Cr. App. R. 168; 73 J. P. 11, 1908. This Court to-day agrees that that is a correct statement of the law, and that in *Joiner's* case it was not put rightly. Applying the rule to this case, the Court will not quash the conviction on this ground, because after the submission that there was no case had been unsuccessfully made counsel for the appellant cross-examined Lewis and called his own client. To have been quite safe he should have taken no part in the subsequent proceedings.

His Lordship went on to say that the conviction must be quashed on the grounds of mis-direction on the law of receiving stolen property and non-direction in failing to put the appellant's case to the jury at all. The appeal was accordingly allowed.

Conviction quashed.

Solicitor for the Appellant—*A. Ross Dagg.*

G. B.

WILBERT ROY GORDON CREAMER.

1919
24 *February.*

The words "living together" in s. 36 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, refer to the legal consortium *and not to mere presence in or absence from the matrimonial home.*

Appeal against conviction and sentence.

The appellant was convicted on January 6th, 1919, before the Recorder, at the Folkestone Sessions, of receiving, and was sentenced to twelve months' imprisonment with hard labour.

H. D. Roome for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The appellant was convicted of receiving money knowing it to have been stolen by a woman named Tidy from her husband. Mr. and Mrs. Tidy were married in 1905, and lived together at various places and at Folkestone for some years. In October, 1916, Mr. Tidy joined the Army and went to France. He left behind him £692 in notes and gold—his savings—in a cash box. While he was away his wife received the usual separation allowance. Mrs. Tidy was charged at the same time as the appellant with stealing the £692, and it was alleged in the indictment that she took the money in September, 1917. In November, 1917, Mr. Tidy came home on leave and discovered the absence of the money, but, on his wife telling him that she had sent it to her mother for safety, he was satisfied, and returned to France in due course. Mrs. Tidy had made the acquaintance of the appellant in August, 1917, and in December, 1917, immoral intercourse took place between them. In May, 1918, Mrs. Tidy and the appellant left Folkestone and went to live together at Seaford. It is submitted that proceedings for larceny can only be instituted by a husband against his wife if the parties are not living together when criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife when they were not living together concerning property of her husband, or unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert her husband: *James*, 1902, 1 K. B. 540; 171 L. J. K. B. 211; 86 L. T. 202; 66 J. P. 217. Here Mrs. Tidy's acts concerning the property of her husband were done when they

1919
24 *February.*

WILBERT ROY GORDON CREAMER.

Darling J.
Avory J.
Lush J.
Shearman J.
Sankey J.

were in law living together, although actually and physically they were living apart. He referred to *Drew* v. *Drew*, 13 P. D. 97; 57 L. J. P. 64; 58 L. T. 923, 1888; *Chudley* v. *Chudley*, 69 L. T. 617; 17 Cox C. C. 697, 1893; *King*, 10 Cr. App. R. 44; 110 L. T. 783, 1914; 1914, W. N. 63; *Marshall* v. *Malcolm*, 1917, 87 L. J. K. B. 491; 117 L. T. 752; 82 J. P. 77. There was no evidence that when she took the money she was leaving or deserting, or about to leave or desert, her husband.

Talbot, K.C., and *Weigall* for the Crown: At common law one spouse could not steal the other's goods. Ss. 12 and 16 of the Married Women's Property Act, 1882 (which are substantially reproduced by s. 36 of the Larceny Act, 1916), made the wrongful taking by a wife of her husband's goods a larceny and *vice versâ*. The fact that to preserve the peace of the home it was provided that no proceedings were competent if husband and wife were living together either when the larceny was committed or when the proceedings were begun does not affect the criminal nature of the act. (See Lush on the Law of Husband and Wife, 3rd ed., p. 522.) Therefore, although Mrs. Tidy, perhaps, should not have been proceeded against, the fact remains that she stole the goods, and the appellant could still be convicted of receiving them. Alternatively, it is submitted that on the facts Mr. and Mrs. Tidy were not "living together" within the meaning of s. 36 of the Act of 1916.

DARLING J.: The appellant was convicted of receiving money which had been taken from her husband by a married woman with whom from time to time the appellant had committed adultery. The woman shared the money with the appellant. The question which arises is whether or not the money was taken by the woman from her husband when they were "living together" within the meaning of s. 36 of the Larceny Act, 1916. It is said by counsel for the Crown that they were living apart at the time. It seems that the money was taken some time before November, 1917, and that the immoral relations between the appellant and the woman began early in the next month. It cannot, therefore, be said that the woman had put an end to the *consortium* (which is what must be considered here) by committing adultery with the appellant. Regard must be had in construing s. 36 of the Larceny Act,

1916

24 *February.*

WILBERT ROY GORDON CREAMER.

Darling J.

1916, to the fact that what the law looks at is the *consortium* of husband and wife. A husband and wife do not live together only when they are living in the same house or occupying the same rooms. They may sometimes be said not to live apart when they are separated by the wide seas. The law regards not merely the physical separation of the one from the other, but the existence or determination of the *consortium*. It is, therefore, little to the purpose to shew that the man was living in France while the wife was living in Folkestone. The husband was in France because he was serving in the Army. He was under orders as a soldier, and he could not leave France unless he was granted leave. It was assumed that the woman was still his wife in the sense that the *consortium* still existed, because she was granted a separation allowance. Counsel for the Crown has argued that the effect of s. 36 of the Larceny Act, 1916, is to declare that a wife may be guilty of the larceny of the goods of her husband. By common law a wife could not steal her husband's goods. To that which her husband possessed she was supposed to have an equal right with him. Counsel for the Crown says that s. 36 must be read as if it said: "From henceforth a wife shall be capable of being guilty of the larceny of her husband's goods" provided that no proceedings shall be taken against her in the circumstances laid in the circumstances specified in the proviso to s. 36, sub-s. 1. In the opinion of the Court, however, if the statute had intended to say that it would have done so in plain language. The Court thinks that no proceedings can be taken against a wife in such circumstances, because no crime has been committed unless the conditions specified in the proviso to the section are satisfied. That view must be the right view unless we differ from what was said by the Court of Crown Cases Reserved in *James*, where Lord Alverstone said: "We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so, if the act relied on as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband." There was a time when a certain author, writing on

1919
24 *February.*

WILBERT ROY GORDON CREAMER.

Darling J.

the law of husband and wife, suggested that although a wife could not be proceeded against for the larceny of her husband's goods, there really was a larceny in fact, and that a third person who received the goods from her, knowing them to have been wrongfully taken from the husband, might be proceeded against as a receiver. (See Lush on the Law of Husband and Wife, 3rd ed., p. 522.) But the author of that work has now come to the conclusion that the suggestion he made in his book cannot be supported, and the argument for the Crown here really amounts to that suggestion. It is unfortunate that the Recorder who tried this case did not deal with this point at all in his summing up. If he had done so there might have been some finding by the jury whether the woman took the money and whether the appellant received it from her in such circumstances that the proviso to s. 36 would not have afforded either of them any protection. In these circumstances this appeal must be allowed.

Conviction quashed.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE AVORY.

ARTHUR MATTHEWS.

1919
3 *March.*

When there is more than one defendant, the direction must distinguish carefully between each case.

A police officer has no right to try to elicit admissions from persons whom he suspects.

Appeal against conviction and sentence.

The appellant was convicted, on January 27th, 1919, at Birmingham City Sessions, before the Assistant Recorder, of warehouse-breaking, and was sentenced to six months' imprisonment with hard labour.

C. K. Tatham (under s. 10 of the Criminal Appeal Act) for the appellant, who was present.

Roland Oliver for the Crown.

AVORY J.: In this case there was a breaking into a warehouse and a stealing of a safe. The safe was traced to a house occupied by a number of brothers, of whom the appellant was one. One of the brothers admitted taking part in the robbery. The others were convicted upon sufficient evidence. With regard to the appellant, the only evidence suggested on the part of the prosecution was that he was found by the police officer some time after the entry of the police into the house, in the W. C. at the back of the house in what is called an outhouse, while his cap was found on the table in the kitchen. That was the whole case against the appellant, except for some inferences which might be drawn from the fact that he did not reply to a police officer, who said to him: "Your brother Edward stated to me that his three young brothers brought the safe

1919
3 *March.*

ARTHUR MATTHEWS.

Avory J.

to his house." The police officer was doing what was not proper in trying to elicit some admissions. The appellant gave evidence, and the Assistant Recorder, in summing up, omitted to distinguish the case of the appellant from that of the other brothers who were charged, when there was a very material distinction between the evidence against the appellant and that against the others. In our opinion the Assistant Recorder ought to have held that there was no evidence to go to the jury against the appellant, and the appeal must be allowed.

Conviction quashed.

T. W. M.

ALFRED ELING AND WILLIAM WALLBRIDGE.

In the case of a first offence, the Court leans against detention even in a Borstal institution.

Appeal against sentence.

The appellants were convicted, on January 23rd, 1919, at Birmingham City Sessions, before the Assistant Recorder, of shopbreaking, and were each sentenced to three years' detention in a Borstal Institution.

D. L. Finnemore for the appellants, who were present.

The Crown was not represented.

DARLING J.: These two boys belong to families of respectable workpeople. With regard to the boy, Eling, there is a previous conviction against him of stealing, when, according to the evidence of the police officer, he was bound over in the sum of £5 and placed on probation. A fortnight after that conviction he broke into a warehouse with other boys and stole several things. Following on that, he and others broke into the shop which is the subject of the present charge. His fault is that he was associated with others, and instead of going to work, they have gone about fooling their time away. He got 33*s.* a week before the offence. We see no ground for interfering with the sentence in this case. The case of Wallbridge, however, is somewhat different. He had not been

1919
3 *March.*

ALFRED ELING AND WILLIAM WALLBRIDGE.

Darling J

convicted of any offence before. This is his first lapse so far. In his case we will allow the appeal in this sense. He will not be sent to a Borstal Institution now, but he will be bound over to come up for judgment if called upon. He does not appear to us to be within the class of persons to whom the provisions with regard to Borstal treatment apply. He will be bound over in the sum of £5 for four years to come up for judgment if called upon.

Sentence of one appellant varied.

Solicitor for the Appellants—*James Hall-Wright*, Birmingham.

T W. M.

The Court, consisting of Darling, A. T. Lawrence and Rowlatt JJ., also sat on March 10th: and consisting of Shearman, Salter and Roche JJ. on March 24th.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE SHEARMAN.

1919
31 *March.*

PERCY PARKER SHEPHARD.

There may be an incitement to murder an unborn child, who is a "person" within s. 4 of 24 & 25 Vict. c. 100, The Offences against the Person Act, 1861.

Appeal against conviction, on certificate.

The appellant was convicted on March 12th, before Mr. Justice Darling, at the Central Criminal Court, of inciting to murder, and was sentenced to five years' penal servitude.

Wynn Werninck for the appellant: The appellant had immoral intercourse with his brother's widow, with the result that she became pregnant. The date of conception was August, 1917. In September, 1917, the appellant wrote a letter to the girl, in which he said: "When the kiddie is born you must lie on it in the night. Don't let it live, as it would never see its father." The child was born in May, 1918. On these facts the appellant was charged with inciting to murder contrary to s. 4 of the Offences against the Person Act, 1861. The particulars given in the indictment were that he, "on September 20th, 1917, solicited, encouraged and endeavoured to persuade and proposed to Cicely Maria Shephard thereafter to murder a newly-born child lately before then [the date of the murder] born of her body." The ground of appeal here is that the incitement was made some eight months before the child was in fact born, and an unborn child is not a "person" within s. 4 of the Offences against the Person Act, 1861. The Court can only regard one date—namely, that of the incitement—and at that time there was no "person" in existence to murder whom anyone could have "solicited, encouraged

1919
31 *March.*

PERCY PARKER SHEPHARD.

Bray J.
Lawrence J.
Shearman J.

or persuaded." In September, 1917, it was not even certain that the child would be born alive.

Travers Humphreys, for the Crown, was not called upon.

BRAY J.: The question for the decision of the Court is whether, on the facts that were proved at the time, the appellant can be guilty of an offence against s. 4 of the Offences against the Person Act, 1861—soliciting or inciting to murder. The appellant certainly incited the girl to commit murder. What would have been the position if the baby had not been born alive the Court need not consider. In fact, it was born alive. The Court is of opinion that the proper construction to be put on the statute is that an offence is committed when there is a persuasion to murder at a future time when the murder will be possible, although at the time of the persuasion it is not possible. Therefore, this appeal fails, and must be dismissed.

Solicitor for Appellant—*A. E. Cubison.*

Appeal dismissed.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

1919
7 *April.*

FREDERICK HIGGINS.

If a defendant jointly charged with another for conspiracy sets up an alibi *or mistaken identity, the jury must not be allowed to assume that the former must be convicted, if the latter is convicted; there must be a direction that the co-defendant may be convicted of conspiracy with a person unknown.*

Appeal against conviction.

The appellant was charged, together with two men named Sturman and Littleford, on the 10th March, 1919, at the Special General Quarter Sessions of the City of Birmingham, on charges of larceny and receiving and conspiracy to steal, and was convicted and sentenced to two months' imprisonment with hard labour. The prosecution offered no evidence against Littleford, and he was discharged. Sturman was convicted and sentenced to two months' imprisonment with hard labour.

Birkett for the appellant, who was present. The points which will be put before the Court in support of this appeal are that there was misdirection in law on the charges of larceny, receiving and conspiracy; that there was a failure to direct the jury, amounting to misdirection, on the question raised of the identity of the prisoner and his defence of an *alibi;* and that the verdict was against the weight of evidence. The facts, based upon the story of the prosecutor, were shortly as follows: The prosecutor, Issachar Gadd, on the 7th of November, 1918, met a man named Edward Sturman near the Bull Ring, Edgbaston Street, Birmingham. Sturman asked Gadd if he had any gold, and Gadd said he had about £200. Sturman said he would take Gadd to a man who would give him notes in exchange for the gold. An appointment was made for the following day, November 8th, the

1919
7 *April.*

FREDERICK HIGGINS.

Darling J.
Bray J.
Avory J.

parties to meet at the "Gaiety" public-house in Birmingham. Gadd met Sturman that day as arranged, and on going together to the "Gaiety" they saw there in a room a man, afterwards identified by the prosecutor as the appellant Higgins. Higgins had his hat off, and Gadd noticed that he had a peculiar eye and a very high forehead; he had also a dark moustache. There was some conversation about price, and drinks were ordered. Sturman then put £13 in gold on the table, and Gadd began to count out his gold. The appellant Higgins put the £13 into his pocket. As Gadd was counting out his gold on to the table in heaps of ten, Higgins kept putting it into his pocket, until he had the whole of the prosecutor's money, amounting to £227 10*s*. Higgins then asked Gadd how he would like the notes to be given in exchange for the gold, and Gadd said, "either tens, twenties or hundreds." Higgins then said he had not got enough, but would go out and fetch the notes. He went out of the room, and never came back. The prosecutor Gadd spent some time in making enquiries about the man who had gone off with his money, but failed to discover his whereabouts, and ultimately on the 22nd of November he gave information to the police. Gadd shortly afterwards saw the man alleged to be Higgins at Hagley stock sale, and gave a description of him to Sturman. He then described the man as having a ball eye and a high forehead. On the 17th December Gadd was at the police court and pointed out a man, thought by him to be Higgins, to Detective Sergeant Harris. Higgins was arrested the same day and charged, together with Sturman and Littleford, with the larceny forming the subject of this appeal.

With regard to the question of identity, which was the most important issue raised at the trial, the evidence given by Issachar Gadd, the prosecutor in the case, was wholly uncorroborated. He was closely cross-examined on the general dress and appearance of the man who took the money, but was entirely vague about any details except with regard to the eye and supposed high forehead. The jury could not test the accuracy of Gadd's observation, as the prisoner was not taken close to them. But the prosecutor's descriptions of the prisoner's supposed defect in the eye were quite contradictory and inconsistent. He also said that the man he wanted had a black moustache; the prisoner had no moustache, and said he had not had one for eight years. The barman at the

1919
7 *April.*

FREDERICK HIGGINS.

Darling J.
Bray J.
Avory J.

"Gaiety" public-house wholly failed to identify any of the three prisoners. The evidence about a time card at the Siddeley-Deasy works established a complete *alibi* in favour of the appellant, and there was ample corroboration of the card. On the question raised about the alteration of the year, I could have shewn by other evidence if time had allowed that the same mistake occurred in other time cards which are now shewn to the Court. The attention of the Court is directed to the evidence given by the superintendent of the works that if Higgins had been away from work he would have missed him, as he was engaged on a very special kind of work.

As regards misdirection, the jury were not properly directed on the question of identity, nor on the law relating to conspiracy. The summing up with regard to conspiracy begged the question of the identity of the appellant, and the jury were not directed that if the appellant was not the man, Sturman could be convicted of conspiracy with some other person unknown. A failure to direct a jury on the defence of an *alibi* when set up is equivalent to misdirection; *Cohen and Bateman*, 2 Cr. App. R. 197, 1909; *Bundy*, 5 Cr. App. R. 270, 1910; *Finch*, 12 Cr. App. R. 77, 1916 The verdict was against the weight of evidence. On this point the case of *Chadwick and others*, 12 Cr. App. R. 247, 1917, may be referred to. I cross-examined the prosecutor Gadd at great length, and his evidence was quite unreliable. It was never contended that Gadd was not robbed by some one. The sole question was whether Higgins was the man who stole the money.

W. D. Sadler for the Crown. Admittedly the figure 1919 was put on the time cards by mistake. There was no evidence at the trial about the same mistake having occurred on other cards. There was evidence of opportunity to forge a card and that there were two or three entrances to the works, so that a man need not use the same entrance if he went in late. The story told by the appellant was unconvincing, and was in itself enough to convict him. Both my learned friend and myself addressed the jury at great length, and they had all the points in the case fully put before them. There was no substantial miscarriage of justice.

DARLING J.: The appellant was tried on an indictment which charged him with defrauding the prosecutor in the case, Issachar

1919
7 *April.*

FREDERICK HIGGINS.

Darling J.

Gadd, of a large sum of money. Gadd gave evidence at the trial of the identity of a man said to be the appellant, who he said was sitting at a table in a room. Before the magistrates Gadd said that the man was cross-eyed. At the trial he gave a different account, saying that the man had a mark on his eye, and that he had a peculiar eye. The Court, after looking at them, is satisfied that there is nothing remarkable about the eyes of the appellant. The defence set up before the magistrates and at the trial was that of an *alibi*, and this was strongly supported by evidence, if a time card was correct. A check or time card from the works where the appellant was employed was produced in Court, shewing that he was engaged there at the time when he was alleged to have been in a public-house in Birmingham. The evidence given by the superintendent of the works was strongly in favour of the appellant, and he stated that if the appellant had been away it must have been known, as he was a skilled workman engaged on a special line of work. The defence of an *alibi* was brought forward at the earliest possible time. There was a suggestion of forgery with regard to the time card, though not with regard to that of November 2nd, *i.e.* a week before. It bore a wrong date—1919—but the jury did not know at the time that several other cards were stamped in a similar manner, and the case went to the jury on suspicion that the card was a false one. The jury were undoubtedly more inclined to convict on that account, and it made it all the more necessary that they should be clearly directed on the question of identity. With regard to the charge of conspiracy, it is quite clear that Sturman was guilty, but the jury were never told that he might have conspired with someone other than Higgins, if Higgins was not the man who took the prosecutor's money. It was on a point vital to the defence. These omissions, in the opinion of the Court, constitute a grave defect in the summing up, and there being no proper direction, misdirection is established. The Court cannot say in this case that there has not been a substantial miscarriage of justice. The appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the Appellant—*J. Hall Wright*, Birmingham.

R. F. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE HORRIDGE.

1919
14 *April.*

JANE TIDEY.

Conviction quashed consequentially on the quashing of a conviction of a co-defendant.

Appeal against conviction and sentence.

The appellant was convicted on January 6th, before the Recorder, at the Folkestone Borough Sessions, of larceny in a dwelling-house, and was sentenced to fifteen months' imprisonment with hard labour.

Kendal-Grimston for the appellant (under s. 10 of the Criminal Appeal Act, 1907). The appellant was convicted of stealing £692 belonging to her husband, while he was away on active service in France. A man named Creamer was convicted at the same time of receiving the money. His conviction was quashed by this Court on February 24th on the ground that there was no evidence that at the time of the abstraction of the money Tidey and her husband were not "living together" within the meaning of the proviso to sub-s. 1 of s. 36 of the Larceny Act, 1916 (above, p. 19). It is submitted that the quashing of this appellant's conviction must follow from the decision in *Creamer's* case.

Weigall for the Crown.

HORRIDGE J.: The quashing of *Creamer's* conviction was due to the fact that there was no adequate direction of the jury by the Recorder on the question whether Mrs. Tidey had stolen from her husband the money which Creamer received. That being so, it is clear that this conviction, too, must be quashed, for there was no proper direction on the law relating to the offence of which the appellant was convicted.

Conviction quashed.

G. B.

ALBERT EDWARD LEWIS.

1919
14 *April.*

Darling J.
Avory J.
Horridge J.

When a defendant accused of receiving stolen property gives evidence, it is especially important that the direction should deal accurately with the law of onus *in such cases.*

Reference by the Home Secretary.

The appellant was convicted on January 14th, 1919, before Mr. Commissioner Rentoul, at the Central Criminal Court, of receiving stolen property with guilty knowledge, and was sentenced to twelve months' imprisonment in the second division.

St. John McDonald for the appellant. The appellant was tried and convicted with a man named Power, whose conviction was quashed by this Court on February 24th (above, p. 17) on the ground of misdirection and non-direction by the Commissioner in his summing up. The summing up was as faulty when it dealt with the case of Lewis as when it dealt with that of Power. The Commissioner never directed the jury on the law of receiving as laid down in *Schama and Abramovitch*, 11 Cr. App. R. 45; 84 L. J. K. B. 396, 1918, but left the jury under the impression that the onus was on the appellant to shew how the stolen property came into his possession.

Eustace Fulton for the Crown. Power's conviction was quashed on the ground that his case was never put to the jury, but that cannot be said of the case of Lewis, which was dealt with by the Commissioner when summing up.

Avory J.: Looking at the summing up as a whole, it is clear that the Commissioner drew no practical distinction between the case of the appellant and that of Power. In Power's case a full Court came to the conclusion (1) that his defence had not been presented to the jury at all as distinct from that of the present appellant, and (2) that there had been no proper direction on the law of receiving. And it was on the latter point that the judgment of the Court quashing the conviction chiefly proceeded. It is advisable that it should be understood that in the opinion of the Court not only was there evidence here upon which the jury could properly have convicted the appellant of receiving, and the

1919
14 *April.*

ALBERT EDWARD LEWIS.

AVORY J.

evidence was such that, if they had been properly directed, this Court could not have disturbed a verdict of "guilty," which would have been the only reasonable verdict possible. This appeal succeeds entirely because the summing up was unsatisfactory. There are some passages in it with which no fault can be found, but others suggest that the prisoners had to satisfy the jury that they were dealing honestly with the stolen property. Its general effect was to lead the jury to suppose that the *onus* of proving their innocence was on the prisoners. The importance of telling the jury that the burden has not shifted is probably greater in a case in which the defendant goes into the witness-box (as the appellant did) than in one in which he does not. The jury not unnaturally are apt to think that when a defendant goes into the witness-box the burden is on him to satisfy them of his innocence.

Conviction quashed.

G. B.

Solicitor for Appellant—*P. Bruce Searl.*

Another Court (A. T. Lawrence, Shearman and Greer JJ.) also sat on April 14th; and the Court (Darling, A. T. Lawrence and Shearman JJ.) sat on April 15th; and on May 9th (Darling, McCardie and Salter JJ.).

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

WILLIAM CHARLES BENNETT.

1919
12 *May.*

Severity of sentence when there has been no previous term of penal servitude.

Appeal against sentence.

The appellant was convicted, on April 10th, 1919, before the Chairman, at the Caernarvon Sessions, of obtaining money by false pretences, and was sentenced to five years' penal servitude, and was ordered to pay the costs of the prosecution.

The appellant in person.

The Crown was not represented.

SALTER J.: The appellant obtained three sums of money amounting to £60 by pretending to carry on a business. Five other cases against him were taken into account by which he had obtained £60 to £70 by similar frauds. It was stated that he had obtained about £1,000 in the same way. There were four previous convictions against him, the longest being one of twelve months' imprisonment. He is 70 years of age, and on that ground and because he has not received a sentence of penal servitude before, the Court thinks that the sentence should be reduced to one of three years' penal servitude.

Sentence reduced.

G. B.

1919
12 *May.*

Darling J.
Avory J.
Salter J.

GEORGE BELL.

Mitigation of sentence in view of reparation.

Appeal against sentence.

The appellant was convicted, on April 12th, before the Chairman, at the Middlesex Sessions, of house-breaking, and was sentenced to seven years' penal servitude.

The appellant in person.

The Crown was not represented.

DARLING J.: The appellant had been convicted several times before, twice to terms of penal servitude. He had broken into other houses than those in respect of which he was indicted, and stolen property was found on the premises where he lived. No doubt he was anxious to make some sort of reparation, and so he restored some property, the proceeds of the other burglaries. The Court thinks that when he sentenced the appellant the Chairman gave no weight to the fact that he had made reparation to a considerable extent. People who commit crimes, however bad they may be, should be encouraged to make reparation, and the only way we can encourage them to do so is to take into consideration when passing sentence on them the fact that they have done some good as well as some evil. The appellant, also, has fought in the war and has a good army record. He has been very badly wounded. The Court reduces the sentence to one of five years' penal servitude.

Sentence reduced.

G. B

GEORGE EDWARD MORTON, *alias* ERNEST SHAW.

1919
19 *May.*

Darling J.
Avory J.
Salter J.

Mitigation of severity of sentence in view of youth.

Appeal against sentence.

The appellant was convicted, on April 10th, 1919, before the Chairman, at the Liberty of Peterborough Sessions, of shop-breaking, and was sentenced to eighteen months' imprisonment with hard labour and two years' police supervision.

The appellant in person.

J. N. Emery for the Crown, referred to the appellant's previous convictions.

DARLING J.: The appellant is a young man and is just at the critical point of his career when it depends on himself whether he becomes a law-abiding citizen, or whether he continues being sent to prison. In 1913 he was sent to an industrial school, and three months later to a reformatory for absconding from the school. In 1916 he was bound over for attempted office breaking, and in 1917 he was sent to a Borstal institution for three years for stealing and for escaping from the reformatory. The Court would not think of altering this sentence if the appellant were not in the Army, and, after all, he has not committed any really grave offence. He has asked to be given a chance to continue in the Army, and the Court intends to give it to him. The Court, therefore, substitutes for the sentence of imprisonment one of two years' imprisonment in a Borstal institution. The appellant will thereby be given an opportunity of reforming and of being then discharged to go into the Army.

Sentence varied.

G. B.

1919
19 *May.*

Darling J.
Avory J.
Salter J.

EDWARD MONKHOUSE.

The Court favours detention in a Borstal institution for convicted youths who are physically fit therefor.

Appeal against sentence.

The appellant was convicted, before the Chairman, at Middlesex Sessions, of housebreaking and burglary, and was sentenced to two years' imprisonment with hard labour.

Schultess-Young for the appellant. The appellant, who is aged seventeen, is a junior clerk employed by the Board of Education at a wage of 22*s*. 6*d*. a week. A misguided love of adventure seems to have led him and two other lads of the same age to commit the three burglaries to which he pleaded "guilty." There is, however, no indication of criminal disposition on his part, and it is submitted that the sentence is too severe.

The Crown was not represented.

SALTER J.: The appellant had no excuse (such as extreme need) for committing this offence. He has had the impudence to say that he robbed these people for amusement. It is clearly a case for a Borstal institution. The appellant has been in trouble once before, two or three years ago, and the only reason why he was sent to prison instead of to Borstal on that occasion was because he was physically unfit for Borstal. He is now fit for Borstal training, and he must go to an institution for three years.

Sentence varied.

G. B.

Solicitor for the Appellant—*W. P. Davies.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE McCARDIE.

JOSEPH H. FERRUA. 1919 5 June.

Mitigation of sentence in view of age and senility.

Appeal against sentence.

The appellant was convicted at the Central Criminal Court on April 30th, 1918, before Mr. Justice Avory, of manslaughter, and sentenced to five years' penal servitude.

Abinger for the appellant, who was not present. My client was indicted for the murder of a married woman who died as the result of an operation performed on her. The appellant pleaded not guilty. In the course of the trial I advised him to plead guilty to manslaughter. This he did. The Crown did not oppose, and the learned judge accepted his plea. The appellant is aged 81, and is on the border line between sanity and insanity.

Counsel for the Crown, after the conviction, made statements which were likely to prejudice the accused. At the end of his statement, he said: "It is quite clear from statements made by the deceased woman to her husband that she had visited the defendant in December, and an operation had been performed on her then that was not successful." That evidence would have been inadmissible at the trial, and was not given at the inquest. There must be some limit to what counsel are entitled to tell the Court before a convicted man is sentenced. He also said: "For the past eighteen years he has been suspected by the police of being an abortionist." Detective John Ferrier, giving evidence after conviction in support of that statement, said: "I may say his illegitimate son has been twice deported for living on the immoral earnings of women." I do not see how what the appellant's son

1919
5 *June.*

JOSEPH H. FERRUA.

Reading L.C.J. Darling J. McCardie J.

had done could affect the question of the sentence. It should not have been mentioned. He also stated that the appellant was an anarchist.

[The LORD CHIEF JUSTICE: I think, as at present advised, your observations on that are justifiable; but the statement cannot possibly have had any effect.]

This was a first offence. The appellant was a very old man and quite senile. This sentence of five years' penal servitude is a death sentence. He has been ill in the infirmary since April 18th, before the date of the trial.

[The LORD CHIEF JUSTICE ascertained from a warder that in hospital he appeared to be "old, infirm and very shaky."]

The appellant was, and is, in a neurasthenic condition.

Cecil Whiteley for the Crown. I thought it right to say that the Crown was in possession of statements made by the deceased woman to her husband which corroborated the evidence of the dates on which she had visited defendant.

The LORD CHIEF JUSTICE: The appellant was charged with the murder of a married woman who died as the result of an operation performed on her to procure abortion. He pleaded not guilty. During the course of the case, his counsel came to the conclusion that it was impossible to resist a conviction for manslaughter, and that in the best interests of his client he should advise him to plead guilty to that offence. Thereupon appellant was allowed a conference with his counsel, and his wife also saw him. He then pleaded guilty to manslaughter. The learned judge accepted that plea, counsel for the Crown offering no objection. It was the wisest course that counsel for the defence could have taken in the interests of his client. The appellant was sentenced to five years' penal servitude, the judge saying that had it not been for his age —he was 81—he would have sentenced the appellant to at least seven years' penal servitude.

Several arguments were put forward in support of this appeal for the reduction of the sentence. It is only necessary to consider

1919
5 *June.*

JOSEPH H. FERRUA.

Reading L.C.J

one of them. There is no doubt the appellant is suffering from senility and debility, and is in a weak state of health. Counsel's statement was supported by the warder. The Court therefore are in a better condition to deal with this sentence than the learned judge who tried him. We are in no way interfering with the discretion of that most experienced judge, Mr. Justice Avory, who tried the case. The appellant has been in hospital since April 17th, and his condition has not improved; if it has altered at all, he has become worse. The justice of the case will be met by substituting a sentence of two years' imprisonment from the date of conviction.

Counsel for the appellant made certain observations on what had been said after the conviction. It is unnecessary for the Court to deal with that.

Sentence reduced.

Solicitors for the Appellant—*Messrs. Lach Szyrma & Co.*

G. M.

WILLIAM JACKSON.

A judge has a discretion, even after the close of the defence, whether he will adjourn the trial for the attendance of witnesses for the Crown.

Appeal against conviction on law.

Application for leave to appeal against sentence.

The appellant was convicted on May 8th, 1919, at the Central Criminal Court, before the Recorder, on two counts for receiving stolen property, well knowing that it was stolen. He was sentenced to three years' penal servitude.

Abinger for the appellant, who was present. The appellant was convicted on two counts of an indictment for receiving stolen property, well knowing that it was stolen. The thief, a lad named Waller, gave evidence that he had stolen jewellery and a Gillette razor, and that he had parted with this property to the appellant. The only property found on the appellant was the razor. Notice having been duly given under s. 43 of the Larceny

1919
5 *June.*

WILLIAM JACKSON.

Reading
L.C.J.
Darling J.
McCardie J.

Act, 1916, a previous conviction of the appellant for receiving on February 22nd, 1918, was proved. At the conclusion of the case for the Crown, I submitted that there was no evidence of the ownership of the razor, as the sole evidence was that of the thief, who was not corroborated on this. Two witnesses who were to have proved the ownership of the razor had left the Court. The case proceeded; the appellant gave evidence and speeches were made. Then the Recorder adjourned the case that the two witnesses who had left the court by mistake might be heard. They were called three days later, and proved the ownership of the razor. I submit that at the close of the case for the Crown, there was no evidence on which the Court could act of the ownership of the razor. Also the previous conviction of the appellant should not have been given in evidence. The learned Recorder should not have adjourned the case after speeches had been heard that further evidence might be given for the Crown. I submit also that the sentence is too severe.

Percival Clarke, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellant was convicted of receiving jewellery and a razor that had been stolen, with the knowledge that the property had been stolen. He was sentenced to three years' penal servitude. He now appeals against the conviction and applies for leave to appeal against the sentence. There is no doubt that if the evidence of Waller, the thief, was accepted, there was abundant testimony of Jackson having received the property well knowing that it was stolen. Waller was only 17½ years old, and he had committed a series of larcenies from houses. His story was before the Court, and there was sufficient corroboration of it in law. The learned Recorder who tried the case at the Central Criminal Court gave the jury, in his summing up, the warning that was required about the necessity of Waller's account being corroborated in some material particular. There is no complaint here on that ground.

The only stolen property actually found on the appellant was a Gillette razor. Proof was given that this razor was found on the appellant, and that the notice required by s. 43 of the Larceny Act, 1916, had been duly given him. Evidence was then given of a previous conviction of the appellant on

1919
6 *June.*

WILLIAM JACKSON.

Reading L.C.J.

February 22nd, 1918, for guilty receiving. The only evidence of the ownership of the Gillette razor was that of Waller, the thief, who stated that it belonged to a Mr. Palmer. A Mrs. Palmer and a Captain Bolt—two witnesses to prove the ownership—had left the court on the first day of the trial, through no fault of those responsible for the prosecution, but through a misunderstanding. The case proceeded in their absence and speeches were made. But at the conclusion of the case for the Crown, the learned counsel for the appellant took the point that the only evidence of the ownership of the Gillette razor was that of Waller, and that it was uncorroborated.

After the case for the defence had been heard, the learned Recorder adjourned the case in order that these two witnesses, Mrs. Palmer and Captain Bolt, might be heard on the ownership of the razor. He thought that justice required that they should be called.

The sole question for us is whether he did anything contrary to law or anything that was unjust to the prisoner by taking this course. On the adjournment the Recorder afforded the defence every opportunity to put forward to the jury any views upon the fresh evidence. Every care was taken that the prisoner should not be prejudiced.

The point taken by counsel for the defence was merely technical. Technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice. The sole point is whether these witnesses should have been called. In our view the learned Recorder acted quite rightly in adjourning the case and calling them. The appeal, therefore, will be dismissed. No argument is possible on the application for leave to appeal against sentence.

Appeal and application dismissed.

Solicitors for the Appellant—*Edgar & Co.*

G. M.

1919
5 *June.*

MICHAEL MULLARKEY.

Reading L.C.J.
Darling J.
McCardie J.

If counsel cross-examines a doctor on the contents of a medical report which the latter has seen but not made he lets in that report as evidence, provided it is properly identified as referring either to the defendant or the sufferer whose state is the subject of inquiry.

Appeal against a conviction on points of law.

Application for leave to appeal against sentence.

The appellant was convicted at Leeds Assizes on May 12th, 1919, before Mr. Justice Coleridge, on three counts for attempting to have carnal knowledge of a girl under the age of 13 years, of indecently assaulting her, and of indecently assaulting her causing her actual bodily harm, and he was sentenced to two years' imprisonment with hard labour.

V. Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Part of the case for the prosecution here was that the appellant and the girl were both suffering from a discharge, that this discharge was due to gonorrhœa, and that this was evidence of the acts complained of. Specimens of the discharge were taken and sent to the Clinical Research Association for analysis. Some of the reports from this Association were read to the jury, although no one was called who had made the analysis.

[McCardie J.: But the cross-examination for the appellant in the court below let them in. Counsel asked the doctor who sent up the specimens: "Do not you know that the proper course of conduct you pursued has given no result?" And again: "Without the presence of *gonococci*, as they are called, can it possibly be said what the discharge was?"]

There were four reports from the Clinical Research Association; two had the name of the girl written on them, one had the name of the appellant written on it, and the fourth had no name at all. In the course of the evidence one of the reports, marked with the name of the girl, was read stating that there were found "a moderate number of *gram-negative diplococci* shewing the

1919
5 *June.*

MICHAEL MULLARKEY.

Reading L.C.J. Darling J. McCardie J.

typical microscopical appearances of the *gonococcus*." The learned judge in his summing up quoted from the report that was unidentified. He said: "We have from London a report to the effect that 'if this discharge came from the urethra,'—which is the passage, if it did not come from the arms or the head, but if it came from the private parts, which the doctor says it did—'if the specimen is from the urethra, the organisms seen are doubtless *gonococci*.'" He did not read either of the reports labelled with the name of the girl. There was nothing to shew as to what discharge the report cited referred. The learned judge assumed that it referred to the girl.

Lastly, in his summing up, the learned judge said, on the question of the appellant's wife, the girl and her grandmother conspiring to put forward the charge—the defence raised: "Think of yourself sitting down in cold blood to construct a plot whereby you could persuade your innocent daughter to give all the details connected with a complaint of this kind. You must consider for yourselves how likely that is" This family were in very low life, and the learned judge put the wrong test to the jury.

[DARLING J.: Yes, but he says just before: "If this has been the result of a conspiracy it is a very elaborate one, which has been very carefully planned and discovering a great deal of ingenuity in its construction. Such plans have been laid; such plans are not impossible. It requires very wicked minds—I should say very dirty minds—and very clever minds."]

I submit that the sentence is too severe.

Adrian Clark, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of attempting to have carnal connection with a girl under thirteen years of age—his daughter—of indecently assaulting her, and of wilfully occasioning her actual bodily harm, and he was sentenced to two years' imprisonment with hard labour. The appellant was living in a room with two beds; in the one slept his wife's father and mother, and in the other he slept with his two daughters and a boy. The charge was that he had behaved in this indecent way with his daughter, a girl of 11 years of age.

1919
5 June.

MICHAEL MULLARKEY.

Reading L.C.J.

It was part of the case for the prosecution that this child had been examined by a doctor and had been found to be suffering from a discharge of *pus* which, according to the medical evidence, might be caused by venereal disease. The case was that the appellant, the father, had been suffering from this disease and had communicated it to the girl, his daughter. Counsel who defended him at the trial cross-examined with the object of shewing that the Crown did not dare to call those who had made the analysis—the result of which, he suggested, was that no *gonococci* were found. He pressed the cross-examination, and as a result elicited statements from witnesses relating to the condition of this discharge. Counsel for the Crown then applied to give evidence of the contents of the reports of the analysis on the ground of this cross-examination. Coleridge J. admitted the reports, and in the view of this Court he was right in doing so. If he had not, a totally wrong view of them might have been presented to the jury.

Counsel for the appellant made a second point of more substance. Two of the reports were identified as relating to the discharge from the girl and one of them as relating to that of the appellant. The fourth report was not identified as relating to the discharge from either. It was this last report which was mentioned to the jury and read to them by the learned judge. This report stated: "This specimen contains many pus cells, with a fair number of *diplococci* which might be either *meningococci* or *gonococci*, or possibly *diplococci* of the catarrhalis type. Without particulars as to the source of this purulent discharge, it is impossible to give a more definite report, but if the specimen is from the urethra, the organisms seen are doubtless *gonococci*." If the matter rested there the appellant would have a strong case in saying that the verdict was based on a report that must have influenced the jury. But there is, in truth, no real substance in the point, because one of the reports which related to the discharge from the girl contained substantially the same evidence. It states that "The discharge contains a few squames and numerous pus cells, together with many *gram-positive micrococci*, some saprophytes, and a moderate number of *gram-negative diplococci*, shewing the typical microscopical appearances of the *gonococcus*." We agree that an error was made, but we think that it was one of no substance, and that no injustice resulted.

1919
5 *June.*

MICHAEL MULLARKEY.

Reading L.C.J.

It was also contended that the judge, in dealing with the evidence of the suggested conspiracy, put a test which was not the correct test. Having carefully examined the summing up, we think that there is no foundation for that criticism. The appeal therefore fails on all three points, and must be dismissed. There is no ground for an appeal against sentence.

Appeal and application dismissed.

G. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE HORRIDGE.

1919
23 & 24 *June.*

HENRY PERRY.

Epilepsy, to sustain the defence of insanity, must be proved to have existed at the time of the commission of the crime.

When that defence has been set up at the trial it is only in exceptional circumstances that the Court will hear any further evidence on that subject.

If it is part of the defence that prisoner is insane at the time of the trial, it should be alleged that he is unfit to plead.

Appeal against conviction on law.

The appellant was convicted, after a two days' trial, on May 28th, before Mr. Justice Darling, at the Central Criminal Court, of the murder of Mrs. Cornish, and was sentenced to death.

Fox-Davies, for the appellant, who was present, stated that the defence being insanity, he had been hampered throughout the trial by the entire ignorance of the appellant's antecedents before the date of the murders other than those obtained from him, and by the absence of any real proof that he was an epileptic. He therefore asked leave to call a Mrs. Smith, a half-sister of Perry, who could give evidence of actual epileptic fits. She had been asked to give evidence at the trial of Perry, but had declined to have anything to do with him, and as the defence had no knowledge at all at that time that she could give evidence of epilepsy, no great pressure had been put upon her to come forward. Counsel read the correspondence which had passed between the appellant's solicitor and Mrs. Smith, and submitted that she could not be regarded as a witness who could have been called in the Court below. He also applied for leave to call a Major Stuart, who had had an interview with Perry at a date not long before the murders were committed and had formed

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J.
Avory J.
Horridge J.

the opinion from his manner that he was insane. This witness was unknown to the defence at the time of the trial. Counsel, in asking further for permission to call Dr. Hyslop, the well-known mental expert, said he would have hesitated to make the application to use his evidence if he merely proposed to give an opinion, but he had had the opportunity of making a careful examination of Perry, and would speak to what counsel submitted was, in effect, evidence of fact and not merely of opinion, inasmuch as his evidence was that the existence of one of the scars on Perry's head in its particular place was in itself sufficient to determine the homicidal nature of his insanity. Counsel asked for indulgence with regard to these witnesses owing to the fact that Perry being illegitimate it had been a matter of exceptional difficulty to get evidence of any antecedent conditions.

The Court allowed the witnesses to be called.

Mrs. Lovey Smith, of Ipswich, stated that she was half-sister to Perry, who was illegitimate. Seven years ago Perry attended a party at her house. He fell on the floor, and struggled violently. Her husband and three others had to hold him. His face was red, and they thought he would choke. Blood came from his mouth as if he had bitten his tongue. He was put on a couch, and "appeared like death." Afterwards her husband laid him on a bed, and his mouth had to be opened with a spoon before water could be given to him. The next morning he told her "it was all in his head," that something came before his eyes, and he had to fall down.

Sir Richard Muir, for the Crown, cross-examined the witness whether she knew of any insanity in her family; she replied, "No." Her brother always suffered with his head. She never suspected him of insanity. He was frequently in and out of prison, and had been sent to penal servitude. After the murders she made a statement, on May 30th, to a police officer, in which she said she was convinced "Harry is not insane," that he always was a vicious brute, and would stop at nothing to gain his ends. Witness admitted that she signed the statement, but said she could not read.

BIBL. LONDIN UNIV.

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J. Avory J. Horridge J.

Major Stuart stated that he was joint secretary of the Prisoners of War Aid Committee at Ipswich. In March, after the great rush of war prisoners to this country, Perry called upon him, and witness thought he was an extraordinary-looking individual. He began a rambling statement, and witness cut him short. He wanted help and money. Witness gave him directions, and Perry went off. He received some money.

Fox-Davies: What was the impression he made upon you?

That he was quite wrong in his head. I thought probably it was due to the treatment he had received as a prisoner of war.

Dr. Theophilus Hyslop, specialist in mental diseases, said the evidence of Mrs. Smith was consistent with the man having had an epileptic fit. After a long examination of accused at Pentonville Prison he came to the conclusion that Perry was of unsound mind and understanding. He had two scars on his head, one an inch and a half long, immediately over the left ear, which Perry said was due to shrapnel, but it was immaterial what caused the injury. The other was longer and on the right side of the skull, extending from two inches above the ear in an horizontal direction towards the back of the head. He said he had received the scar in the war. Witness found the man had hallucinations of hearing of a definitely organised type. He believed there were voices coming from without, and he had not only a belief in the reality of the hallucinations, but they pervaded the whole of his mentality. He explained to witness that the voices told him he was destined for something great, that his mission in life was to reform the world, and make everybody happy. Witness found his ordinary sense of hearing was very little impaired. When he stood with his toes and heels together and eyes closed he swayed. He said he experienced giddiness, and that before his attacks he felt everything was going round, and then he remembered nothing more. Before the attacks he said he suffered from singing noises in the ear. Witness had records of a precisely similar class of events.

[The LORD CHIEF JUSTICE: Please explain that.]

"Homicidal conditions."

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J.
Avory J.
Horridge J.

Fox-Davies: Did you attribute the unsoundness of mind of which you have been speaking to the injury to the skull?

Undoubtedly.

Do you consider he is insane now?

I do.

Witness described prisoner's condition as delusional insanity, with homicidal impulse occurring during the epileptic state. Witness added that he believed the man had become insane since he had received the injury to the skull. It must have taken some time before his delusions could be organised as they were. At the time of the committal of the acts he did not think accused knew the difference between right and wrong, and when examined by witness he remembered nothing about it. When he gave a detailed statement of what occurred he was in a sub-conscious condition. He knew exactly what had happened within that period, and there was a possibility that with a recurring fit he might again be able to recall the facts. In addition to hallucinations about voices, he had some visions.

Cross-examined by *Sir R. Muir*, witness answered that he understood some members of accused's family on the maternal side had been in an asylum, but he could not verify it. Often when in a sub-conscious state of mind people recollected with extraordinary accuracy what had happened while they were in an epileptic condition.

By the Court: Perry told him he knew nothing about the deed. He did not believe he had done it, and he considered the case was "a put-up job by the Government to get rid of him, so that the Government could get his bags of gold and his property." He knew he was in prison and was convicted of the murders. His mania was to kill.

The LORD CHIEF JUSTICE: Would you expect him to rob?

There are one or two recorded cases in which a person robbed as well as committed the more serious offence.

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J.
Avory J.
Horridge J.

The LORD CHIEF JUSTICE: You bring that down to one or two cases; that makes it rare.

Usually it is a maniacal *furore* of a homicidal type.

The LORD CHIEF JUSTICE: What is the impulse to steal?

A good deal will depend upon the previous mental bent. The evidence of accused covering up the body of Mrs. Cornish with boards and lumber made no impression on my mind. It was quite possible for elaborate details to be carried out.

The LORD CHIEF JUSTICE: Suppose a policeman had looked in at the window when he was committing the crime or covering up the body, would you expect him to stop?

I would expect him to attempt to go for the policeman. Under the homicidal impulse he would attack any person who came in. Such a person was sometimes extremely crafty, and the fact that accused ran away afterwards and changed his clothes made no impression on my mind.

The Court being informed that the Crown was prepared with evidence of the prison records of the appellant, called

Dr. Sidney R. Dyer, Chief Medical Inspector of Prisons, and formerly of Brixton Prison, produced entries made at Dartmoor Prison from August, 1909, when appellant was in hospital. He complained of other prisoners annoying him. On August 19th there was a note: "Apparently had a fit yesterday. Found in dazed condition beside his bed. Complained of people talking to him all night." On August 20th there is a note: "Found in the morning with face abrased. Says he fell off his bed in a fit." On August 21st there was a note of a second fit, the final words at the last date, when Perry was discharged from hospital, being "no mental disease." Cross-examined: From February, 1894, to November, 1916, the man was in prison at various times. He described the marks on Perry as officially recorded, including two head scars.

1919
23 & 24 *June*.

HENRY PERRY.

Reading L.C.J.
Avory J.
Horridge J.

The LORD CHIEF JUSTICE: It shews that the statement that he got the scars by shrapnel was not true?

That is so.

The Crown was allowed to call

Dr. Higson, of Brixton Prison, who was a witness below. On May 3rd and on later dates accused gave him minute details about the crime. He also wrote a letter which witness at first detained, thinking it was an insane letter, but afterwards ascertained the appellant filled up the paper by copying an extract from a newspaper.

The LORD CHIEF JUSTICE: The *crux* of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a most dangerous doctrine if a man could say, "I once had an epileptic fit, and everything that happens hereafter must be put down to that."

Fox Davies submitted that a reference to the cross-examination of the medical witnesses at the trial shewed that the whole of their evidence had been discounted to the jury by the reiteration of the suggestion that the evidence of epilepsy and hallucination rested upon the statements of appellant himself. It was now established by independent evidence that he was an epileptic. Counsel also submitted that in the course of the summing up Mr. Justice Darling had laid it down that none of the medical witnesses had asserted that Perry was insane at the time of his trial, whereas each of the three medical witnesses called for the defence had so sworn in evidence, and counsel submitted that this misdirection alone was sufficient to vitiate the trial. Counsel submitted in conclusion that the application of the answers of the judges in the *Macnaghten* questions formed no true test where, as in this case, the evidence pointed to the dual mentality of the epileptic or *post*-epileptic subconscious state. In any case of dual mentality there must be an ordered logical sequence of actions which might thereby seem sane. If the medical opinion was to be lightly brushed aside and the appeal made to the common intelligence, then the mere fact of four murders being committed

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J. Avory J. Horridge J.

one after the other in such revolting circumstances as the murders in this case was of itself, he submitted, ample evidence of insanity.

The LORD CHIEF JUSTICE: That would be a powerful point but for the fact of the stealing. That supplied the motive for the first killing, and then there was a motive for the others in the desire to get rid of evidence. If he were insane, why did you allow him to plead? The proper time to try that was when the question arose whether he was fit to plead.

Fox-Davies said he had to use his discretion. There were two tests, fitness to plead and responsibility for his acts, and he should have been sorry to ask the jury to draw distinctions between the two.

Mr. JUSTICE AVORY: It is not unknown. I have known cases where a jury had found upon the trial of that issue that the man was fit to plead, and nevertheless had found him insane at the time he committed the act.

Sir Richard Muir (with him *Percival Clarke*) was not called on.

The LORD CHIEF JUSTICE: The Court has to inquire whether they are prepared to substitute another verdict for that of the jury. The case is by no means an easy one. We are dealing with a man who, in the words of one of the witnesses, has always been a vicious brute, of a cruel temper, and stops at nothing to gain his own ends. On the other hand, it is said that at the time of the murders he was suffering from an epileptic attack, or was in a condition of mind resulting from epilepsy which made him insane. That the man is of a low type of intelligence and a person who does bad acts is established, and the Court has to consider whether it has been established by evidence that it would be justifiable to interfere with the verdict. There is no doubt about the law, and the judge at the trial laid it down with scientific accuracy.

The law is as it was laid down in *Macnaghten's Case* in 1843. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved.

To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such a defect of reason as not to know the nature and quality of the act which he is committing—that is, the physical nature and quality as distinguished from the moral—or, if he does know the nature and quality of the act he is committing, that he does not know that he is doing wrong. In either of these cases he would be entitled to a verdict of guilty but insane at the time. Now all the facts in this case are consistent with the acts of a sane man of a criminal and brutal disposition. The evidence of the doctors is also consistent with that view. There is, however, evidence of a medical character before the jury, and there are statements made by the prisoner himself, that he has suffered from epileptic fits. The Court has had further evidence, especially in the prison records, of his having had attacks of epilepsy. But to establish that is only one step; it must be shewn that the man was suffering from an epileptic seizure at the time when he committed the murders; and that has not been proved.

The evidence of Dr. Higson, who has had the best opportunity of observing him, is against the view that the appellant was suffering from delusions or from the effects of epilepsy when he came under notice after arrest. The jury had the whole case before them, and they accepted the testimony of Dr. Higson. The evidence of Dr. Hyslop loses much of its significance from the known facts of this particular case, and indeed the evidence of all the doctors called for the defence rests entirely on theories which they have formed from statements made to them or from their personal observations of the man. There is also the difficulty that they cannot indicate any test which would enable the Court to distinguish between the acts of a sane and of an insane man. It is not their fault, because no such test is known. The jury came to the conclusion that they were not satisfied with the evidence of insanity, and they must have preferred the evidence of Dr. Higson. The additional evidence of Dr. Hyslop has not satisfied the Court that they should substitute the verdict of insane at the time of the murder for the verdict which the jury actually found. We have arrived at the conclusion that there is not sufficient evidence to displace the view at which the jury arrived, and therefore the verdict must stand.

1919
23 & 24 *June.*

HENRY PERRY.

Reading L.C.J.

Owing to the exceptional character of this case, it was decided to hear fresh evidence, but it must not be taken as a precedent that in cases of this class the Court will do so again. The Secretary of State for Home Affairs has opportunities for making inquiries which are not open to this Court. If he chooses to make such further inquiries, that is a matter for him and not for us.

Appeal dismissed.

Solicitor for the Appellant—*H. O. Carter.*

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROCHE.

FREDERICK HORSENAIL.

1919
30 *June.*

On the trial of an indictment for receiving stolen goods with guilty knowledge, the jury must be carefully directed that they are not trying a charge in respect of other stolen property found in defendant's possession of which evidence has been admitted.

The appellant was tried, before Commissioner Atherley Jones, at the Central Criminal Court, on May 29th and 30th, and convicted of knowingly receiving stolen goods, the proceeds of numerous burglaries of private houses in the Acton district, and was sentenced to twelve months' imprisonment in the second division. The stolen goods consisted of articles of jewellery and manicure sets.

Keeves for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. In the course of the case for the prosecution evidence had been given, under s. 43 (1), Larceny Act, 1916, in order to shew guilty knowledge that a pair of stolen pearl earrings, not the subject of the indictment, were found on the accused. The learned Commissioner in his summing up failed to differentiate between the pearl earrings and the property, the subject of the indictment.

Fulton, for the respondents, could not support the summing up.

THE LORD CHIEF JUSTICE: The learned Commissioner failed to direct the minds of the jury to the difference between the stolen property, the subject of the indictment, and the pearl earrings, but directed them in such language that they might reasonably

1919
30 *June.*

FREDERICK HORSENAIL.

Reading L.C.J.

think that the pearl earrings were equally the subject of the charge as the stolen property specified in the indictment. In the circumstances the conviction cannot stand.

Conviction quashed.

R. H.

---

1 *July.*

SAMUEL LINGLEY.

Severity of sentence mitigated in view of age and previous good character.

Appeal against sentence.

Appellant, an agricultural labourer, was convicted, on May 26th, at the Suffolk Assizes (Bury), before Horridge J., of receiving twelve fowls with guilty knowledge, and was sentenced to six months' imprisonment with hard labour.

Appellant was not present, and no counsel appeared.

The Court, in view of the fact that appellant was sixty-four years old and had not been convicted before, reduced the term to two months.

Sentence reduced.

R. H.

---

30 *June,*
1 *July.*

HARRY HALL.

A power of attorney to manage the affairs of a person who has the charge of helpless patients does not necessarily make the holder responsible for the criminal negligence of that person.

Under s. 9 (a) *of the Criminal Appeal Act, the Court has power to receive as fresh evidence depositions in a coroner's court not put in at the trial.*

Appeal on a point of law against a conviction for manslaughter of Miss Spurling, before Horridge, J., at the Chelmsford Assizes, on June 5th, after two days' trial. The appellant was on bail.

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.
Avory J.
Roche J.

The grounds of appeal were shortly as follows:—

1. That there was no evidence of any legal duty either by contract or by the act of taking charge on the part of appellant to provide medical attendance and proper and sufficient nourishing food for the deceased woman or to perform any act, the omission of which would render him criminally responsible.
2. That assuming any such duty, there was no evidence that appellant neglected it wilfully in the sense of being careless whether the deceased died or not, or that he had a reckless and wicked mind.
3. Misdirection to the jury.
4. That the verdict was unreasonable and having regard to the evidence could not be supported.

The last-named ground of appeal was added by leave of the Court.

Sir Edward Marshall Hall, K.C. (*Eustace Fulton* and *H. R. Pigeon* with him) for the appellant. The point of law which the Court is asked to decide in this appeal is based largely on *Mary Nicholls*, 13 Cox, C. C. 75, 1874, where Brett J. said: "If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy . . . . lunacy or other infirmity, he is bound to execute that charge without (at all events) wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be wicked negligence, that is, negligence so great, that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not." The facts are shortly as follows. The appellant in the present case is an auctioneer and estate agent, some sixty-five years of age, and acted in the capacity of friend and financial adviser to a Mrs. Binstead, whom he had known for some ten years. Mrs. Binstead was at one time a qualified nurse, and afterwards kept homes for the reception of persons who were mentally defective. In 1912 she acquired some premises known as Wittering Court, Essex, where she maintained some twelve to twenty patients, the majority of whom were epileptics. Certain financial arrangements were necessary for the acquisition of

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.
Avory J.
Roche J.

Wittering Court, and these were made by or under the direction of the appellant for the benefit of Mrs. Binstead. The home was carried on satisfactorily up to September, 1915, when Mrs. Binstead was seized with a paralytic stroke. Shortly after this, on November 22nd, 1915, Mrs. Binstead executed a general power of attorney in favour of appellant, which practically put him in full financial control of the establishment at Wittering Court, though Mrs. Binstead continued to look after the management of the home and its inmates. In November, 1918, Dr. Adams, who attended the patients at the home when necessary, wrote a letter to the appellant complaining in strong terms of the state of affairs at the home with regard to the cleanliness and general condition of the inmates. The appellant was also told verbally that the home was in an unsanitary condition. On the 27th December, 1918, he promised to go and see into matters, but did not go. On the 5th January, 1919, Miss Spurling, an inmate of the home, and the subject of the charge against appellant, died. A post-mortem examination took place on the 8th January, and on January 10th the coroner's inquest was held and continued with several adjournments up to the 5th March. Evidence was given before the coroner that the deceased woman died from heart failure accelerated by neglect and starvation. The appellant and Mrs. Binstead were subsequently arrested on a charge of manslaughter and committed for trial at the ensuing assizes by the magistrates and also on the coroner's warrant. The trial took place on the 4th and 5th June, with the result that the appellant was convicted of manslaughter and sentenced to three months' imprisonment with hard labour. Mrs. Binstead, the fellow defendant of the appellant, was found at the trial to be unfit to plead and was ordered to be detained during His Majesty's pleasure. It will be noticed that at the trial the charge in the indictment against the appellant for aiding and abetting her to kill the deceased was withdrawn. Now, in the first place, the evidence of Mrs. Newman at the trial shews that appellant did look after the business relating to the home and made himself mainly responsible for the financial arrangements, so far as the mortgagees were concerned, but there is nothing in Mrs. Newman's evidence or in that of other witnesses to shew that appellant interfered with the domestic management of the home.

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.
Avory J.
Roche J.

[AVORY J.: The words used in the judgment quoted to the Court are "undertake the charge" . . . .]

At this stage of the argument counsel asked for leave to amend the notice of appeal in the terms of the fourth heading (above), and the Court gave leave in the absence of objection by counsel for the Crown.

The evidence shews that money was borrowed from the appellant for the purpose of buying food and that Dr. Adams was in the habit of going every week to see the inmates of the home who required attention. Everything was satisfactory up to Easter, 1917.

[The LORD CHIEF JUSTICE: It looks at the moment as if the *crux* of the case was the conversation between the doctor and the appellant, when the latter suggested a fortnight's delay before informing the medical officer of health. The question seems to be whether the appellant at that time knew of the real condition of things at the home.]

The submission is that the preliminary direction to the jury was misleading. It treated the evidence as disclosing a duty on the part of the appellant as early as March, 1917. The evidence shewed clearly that appellant never ordered any food or took any part in the management of the house. Dr. Adams said that the appellant was willing and anxious for an improvement in the condition of the home. The power of attorney which was executed by Mrs. Binstead in November, 1915, was in general terms and undoubtedly gave the appellant full control over the financial affairs of Mrs. Binstead so far as the home was concerned, but there was no evidence that the appellant acted otherwise than with a view of protecting the interests of the mortgagees. The appellant was in a great difficulty at the trial owing to the fact that Mrs. Binstead was found by the jury to be unfit to plead, and also because the coroner's depositions were not put in evidence. With regard to the latter I ask that they may be put in as evidence before this Court.

The coroner's depositions were then put in by leave of the Court, there being no objection on the part of the Crown.

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.
Avory J.
Roche J.

The evidence of Mrs. Binstead given before the coroner shews clearly that she was the responsible person in charge of the home, and that she did not realise that the deceased was seriously ill. It also appears that the condition of the home only deteriorated after Mrs. Newman left in 1916. With regard to the summing up of the learned judge, the letter of the 24th March, 1918, written by the appellant to Mrs. Binstead, was read out to the jury by the learned judge, but he made no comment upon it, nor did he direct the jury how they were to consider it in any way.

[THE LORD CHIEF JUSTICE: If the evidence stopped short at March, 1918, there would be no case against the appellant. What happened afterwards is the important question.

AVORY J.: Supposing the appellant *had* gone to Wittering Court and had been refused access to the patients by Mrs. Binstead, what could he have done ?]

There is no evidence that appellant did go to the home after 28th March, 1918. The judge practically directed the jury that there was a duty thrown upon appellant to go and see for himself what the condition of the home was. In three different sentences the phrase "owed a duty" occurs. There was no evidence that appellant was, in the judge's language, "guilty of gross negligence, negligence which shewed that he did not care whether the patient lived or died."

The evidence given by Mrs. Binstead clearly shews that she was the responsible person in charge of the inmates of the home and that she did not realise the dangerous condition of Miss Spurling, the deceased woman.

Roland Oliver for the Crown. The evidence relating to the interview between appellant and Dr. Adams and other witnesses shews that appellant knew that Mrs. Binstead was incapable of managing the home unless she had skilled assistance. Appellant interviewed the leaving servants at the home, and he advertised for others to take their place. He was acting as if he knew Mrs. Binstead was incapable of managing the house, and had undertaken the management himself. He had that power.

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.
Avory J.
Roche J.

[AVORY J.: Control of financial arrangements does not imply charge of the inmates of the home.]

In his last interviews with Dr. Adams and Mrs. Newman his expressions are only consistent with his being in control there.

The LORD CHIEF JUSTICE: The appellant was convicted of manslaughter, and was sentenced to three months' imprisonment with hard labour. The main facts of the case were that a Mrs. Binstead, a qualified nurse, with previous experience in dealing with mental defectives, took premises, known as Wittering Court, Essex, with the assistance and acting under the advice of the appellant, for the purpose of carrying on a home where persons mentally defective, but not certified as lunatics, could be looked after on payment of certain fees. There were at first some twenty or more patients in the home. In August, 1915, Mrs. Binstead had a paralytic seizure, and in November of that year she executed a general power of attorney in favour of the appellant. The power of attorney was in general terms and gave the appellant authority to exercise all powers of control and management of Mrs. Binstead's affairs. There is no doubt that the appellant acting under the power did exercise financial control over the affairs of the home. The defence put forward on his behalf is that this control was limited to financial matters. The prosecution, on the other hand, say that the appellant was, under the terms of the power, entrusted with and exercised full powers and duties of management over the home and its inmates. The Court thinks that up to November, 1918, there is no evidence of any acts which shew that the appellant had control over the food supplied to the inmates of the home or over matters relating to their health. In November, 1918, Dr. Adams, the medical attendant at Wittering Court, wrote a letter to the appellant, pointing out that Mrs. Binstead was incapable of looking after the inmates, and that Miss Hamilton was quite unable to carry out her duties at the home. Shortly afterwards, on the 1st December, Dr. Adams had an interview with the appellant, at which the condition of these two individuals was discussed, and the appellant then said that he was negotiating for the sale of the premises, and was hoping to send the patients away and close the home. The appellant asked Dr. Adams to wait a fortnight before

1919
30 *June*,
1 *July*.

HARRY HALL.

Reading
L.C.J.

communicating with the authorities. Now the real question in the case is: Was there sufficient evidence to support the verdict of the jury, shewing that the appellant had undertaken the duty of looking after the inmates of the home? We have been referred to the case of *Nicholls*, 13 Cox, C. C. 75, where Brett J. said: "If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy . . . . lunacy or other infirmity, he is bound to execute that charge without (at all events) wicked negligence, and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter . . . ." and he then proceeds to define what he means by wicked negligence. Everything in this case turns on the point whether the appellant had undertaken a duty. He was, no doubt, in a difficult position at the trial. Mrs. Binstead, who was charged with manslaughter together with him, was found by the jury to be unfit to plead, and unfortunately none of the statements made by Mrs. Binstead at the inquest before the coroner were before the learned judge at the trial. On application being made to us by counsel for the appellant, and there being no objection on the part of the Crown, we allowed the depositions taken before the coroner to be read before this Court. The evidence in those depositions shews that Mrs. Binstead was in control of the inmates of the home up to the last, and a letter of the 27th December, 1918, written by her indicates that she was in correspondence with their relatives. With this evidence before us we think that on the whole it would not be safe to allow the verdict of the jury to stand. We are prepared to exercise our powers under s. 4 of the Criminal Appeal Act, 1907, and say that the verdict should be set aside. The appeal will therefore be allowed and the conviction quashed. We may add that, in our opinion, the summing up of the learned judge was quite complete, and that his direction to the jury was most careful.

Conviction quashed.

R. B.

Solicitors for the Appellant—*Goldberg and Barrett.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE ROCHE.

STANLEY OXLADE.

1919
14 *July.*

Sentence of a long term of imprisonment ought not to be passed in order to secure indirectly the benefit of the modified Borstal System.
Observations on that system.

Appeal against sentence.

The appellant, who was nineteen years of age, was convicted, on June 11th, before the Chairman, at the Middlesex Sessions, of housebreaking, pavilion-breaking and attempted burglary, and was sentenced to two years' imprisonment under the Modified Borstal System.

The appellant in person.

Sir Archibald Bodkin (*Turrell* with him), for the Crown, asked for a direction from the Court what sentence should be passed on offenders between sixteen and twenty-one who were not recommended for Borstal treatment owing to medical unfitness. The appellant, he said, had a perfectly good record since he left school. He was reported as medically unfit for Borstal owing to having a paralysed right arm.

Bodkin read a report from Sir Evelyn Ruggles-Brise, Chairman of the Prison Commissioners, in which the following passages occurred:—

"As explained at the hearing of *J. H. Smith*, 9 C. A. R. 117, 1913, there is no statutory authority for sentence under the Modified Borstal System. That system is only an administrative arrangement made by the Commissioners for giving effect to Statutory Rules of August 3rd, 1909, for the special treatment of prisoners between sixteen and twenty-one. It was called the Modified Borstal System to emphasize the distinction between the treatment

1919
14 *July*.

STANLEY OXLADE.

Reading
L.C.J
Shearman J.
Roche J.

of such young prisoners and that of ordinary prisoners. Borstal Committees are established at all prisons to watch over the operation of these Rules and to provide for the discharge of these young prisoners on lines analogous to those followed by the Borstal Association in the case of 'full' Borstal sentences. Apart from the operation of these Special Rules the system does not differ from that of ordinary imprisonment, except that remission does not necessarily apply. The object of this was to give some hold to the prison authorities and Borstal Committees over a wayward young prisoner who shewed no disposition towards amendment and only looked forward to his discharge when he had earned sufficiency of marks. In practice, generally, the remission is granted. . . . . The Commissioners have never advocated long sentences of imprisonment under the Modified Borstal System. All that has been done is to deprecate a succession of very short sentences, and it has been suggested to courts that it would be better to give a sentence which would admit of healthy influences operating, as in a 'collecting centre,' *i.e.*, a sentence of three months or over. It is not pretended that any great results can be achieved in such a short period as three months, but the system has at least a negative result in that it strictly prevents contamination by adults and concentrates attention on each particular case in a way which would not be possible if these cases were, as formerly, subject to ordinary conditions of imprisonment. In other words, it is a serious attempt to 'individualise' the young prisoner with a view to some response being made by him to the chance that may be offered while serving sentence."

Sir Evelyn Ruggles-Brise gave evidence regarding the standard of physical fitness necessary for boys who are sent for "full" Borstal treatment, and expressed the opinion that a lad of the good character possessed by the prisoner should not be sent to Borstal. (The effect of his evidence appears in the judgment of the Lord Chief Justice.)

The LORD CHIEF JUSTICE: The appellant, who is nineteen years of age, pleaded "guilty" to three indictments charging him with housebreaking, pavilion-breaking, and attempted burglary, and was sentenced to two years' imprisonment with modified Borstal treatment. He appeals to this Court against his sentence. When

1919
14 *July.*

STANLEY OXLADE.

Reading L.C J.

the case was before the Chairman of Middlesex Sessions a report was made to the Court that he was physically unfit for the Borstal system of training, as he had paralysis in one arm. The Chairman therefore came to the conclusion that he could not send him for full Borstal treatment, but that he would have to serve in an ordinary prison under the modified Borstal system. The Chairman sentenced him to two years imprisonment with the modified Borstal treatment so that he might have a sufficiently long period there to get the benefit of the discipline and training. Apart from the appellant's medical unfitness there was testimony by the police that he had a good character up to the early part of this year, and he was not of criminal tendencies or association; he would therefore not be qualified for treatment in a Borstal Institution. (See s. 1 (1) (b) of the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59.)

The difficulty which arises here is that it was apparently thought that, although the appellant could not be sent to a Borstal Institution, he could be sentenced to a long term of imprisonment so that he might get the benefit of modified Borstal treatment. The Chairman pointed out that he was in a difficulty owing to some decisions of this Court in similar cases, and asked for a definite ruling from the Court on the points raised.

This is a matter of importance. In dealing with juvenile criminals it is eminently desirable that care should be taken to fit them, as far as human ingenuity can, for a better life when they are released, and it was with this object that the Borstal system of treatment was devised. Now it was found necessary to have certificates of the lads' physical fitness for the full Borstal training. At one time the Statutory Rules made with regard to these matters and sent to magistrates and judges dealt with the cases as if a lad was to be considered physically unfit if he was unable to take part in gymnastics and games and occupations of that character. But latterly, as we have learned from the memorandum which Sir Evelyn Ruggles-Brise has placed before us, and from the evidence he has given verbally to-day, a system was adopted in 1915 as a result of experience by which the rigidity of the rules about physical fitness was relaxed, and under the Regulation or the Circular which was then issued with regard to the standard of physique for admission, it is made plain that, although the lad must be capable of doing, or of being taught to

1919
14 *July.*

STANLEY OXLADE.

Reading L.C.J.

do, a full day's work at some occupation, whether sedentary or active, by which a living can be earned, it is not necessary that he should be fit for gymnastics or heavy manual labour. The Commissioners point out that he should, however, if possible, be fit for modified drill and physical exercises. Then there are some further stipulations which I will not read, as I have no doubt that this Circular will now be published to all those who have to deal with these cases, and there are certain specific defects which are stated by the Commissioners as defects which should no longer exclude a lad from the Borstal system unless accompanied by some exceptional complication, and among these, and, perhaps as one of the best instances and going furthest in the direction of extending the treatment, is the loss of a leg or an eye, or a finger. In the present case, this condition of paralysis of one arm would not, in the opinion of the Chairman of the Prison Commissioners, be sufficient to exclude him. But the other reason to which I have already adverted would be sufficient to exclude him, that is, that he is not shewn to have been of criminal tendencies during his life; and the question therefore arises, what should be done in the circumstances.

In our view, the court ought not to sentence a lad like the appellant to a long term of imprisonment in order to get for him, indirectly, the benefits of the Modified Borstal System as administered in our prisons. We have been told that in the ordinary prison a juvenile between the ages of sixteen and twenty-one, whatever the sentence, is dealt with in a special class as a juvenile, but if his sentence is for more than three months, he is then segregated with other lads of a similar age into what is called a collecting station, where he has the advantage of learning a trade.

The Court is glad to know that this care is taken of juveniles in prison, and is not surprised to learn that the Prison Commissioners devote so much thought and attention to giving a better chance to lads of this kind when they leave the prison. But that fact, important as it is, does not justify such a sentence as has been pronounced in this case. Two years' imprisonment under the Modified Borstal System must be regarded as two years' imprisonment. The fact that the lad, because of his age, gets the benefit of the modified treatment, is a matter which, as we have already indicated, must not lead the Court to sentence him to a long term. The proper sentence to pass on this boy is one

1919
14 *July.*

STANLEY OXLADE.

Reading L.C.J.

of six months' imprisonment, during which he will be dealt with, as we have heard, under the prison rules.

We should like to observe, also, that it is satisfactory to hear that there was before the war a proposal by the Prison Commissioners to institute a prison, or establishment, to deal with these physically defective cases, and it is to be hoped that that plan may soon be put into effect. We would also observe that it is desirable that whenever Regulations or Circulars—circulars in particular—are issued to explain what happens under this kind of treatment they should be sent to those who have the sentencing of lads or to those who have to consider the revision of sentences. If that were done we should not get, as we do get at times, different courts taking contradictory views of the proper sentences to be applied.

Sentence reduced.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SANKEY.

1919
21 *July.*

GEORGE WILLIAM JONES.

The Court disapproves of concurrent sentences of penal service and imprisonment with hard labour.

Application for leave to appeal against sentence.

The applicant, who was not present, was convicted, at Bristol Assizes, on June 26th, 1919, before Mr. Justice A. T. Lawrence, of sodomy, attempted sodomy and gross indecency with male persons, and was sentenced to five years' penal servitude in respect of the sodomy and attempted sodomy, and twelve months' imprisonment with hard labour (concurrent) in respect of the gross indecency.

No counsel appeared.

SANKEY J.: The appellant, who is forty-nine years of age, has been employed as a temporary postman at Bristol, and the offences took place at his lodgings. The case is an exceptionally bad one, and there are no mitigating features. It is not, however, the practice of this Court to allow sentences of penal servitude and imprisonment with hard labour to run concurrently. The proper course is to dismiss the appeal against the sentence of five years' penal servitude and to reduce the sentence of twelve months' hard labour to three days' imprisonment.

Sentence varied.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE SANKEY.

WILLIAM JAMES TWIGG.

1919
28 & 29 *July.*

When defendants are jointly indicted but not all on all charges, the jury must be directed to discriminate carefully between the respective allegations.

Appeal against conviction on a point of law.

The appellant, who was present, was tried with three other men and convicted at Middlesex Sessions, on June 24th, before the Chairman, of receiving with guilty knowledge, and was sentenced on July 5th to four months' imprisonment in the second division.

Rigby Swift, K.C. (*Curtis Bennett, K.C.*, and *St. John Hutchinson* with him), for the appellant. The Chairman did not properly direct the jury. He did not sufficiently distinguish the case of the appellant from those of the defendants with whom he was tried. There are passages in the summing up which led the jury to infer, wrongly, that the appellant was concerned in receiving the goods, the proceeds of the three thefts in respect of which the other men were charged.

Cecil Whiteley for the Crown. The jury heard the speeches of counsel on both sides, and all the issues were fully explained to and placed before them.

LORD READING, C.J.: This case is very near the line. The appellant was charged with receiving ten gallons of lubricating oil and other goods. Unfortunately, the learned Chairman, at both the beginning and end of his summing up, referred to the appellant being charged with receiving goods in three cases of

1919
28 & 29 *July.*

WILLIAM JAMES TWIGG.

Reading L.C.J.

theft for which another of the prisoners was on trial. It was only a slip and it is a pity that the Chairman was not corrected; but it may have affected the minds of the jury, who convicted the appellant of receiving in the three cases, whereas he was only indicted in respect of two of them. If that had been a merely technical matter this Court would have refused to interfere, but it must be taken into consideration together with other matters. It was a case in which it was necessary to discriminate carefully between the different defendants, and the jury should have been told that the appellant's case stood on a footing wholly different from those of the other men who were charged. No doubt this position was put before the jury by the counsel who represented the appellant, but the Chairman in summing up did not adequately distinguish *Twigg's* case from the others. We cannot say that the jury would have convicted if they had been properly directed, and, therefore, this appeal must be allowed.

Conviction quashed.

G. B.

Solicitor for Appellant—*Wilfred Firth*, Brentford.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

SAMUEL STANFORD.

1919
30 *July*.

Verdict against the weight of evidence.

Appeal against conviction and sentence.

The appellant was convicted on July 4th, 1919, before the Deputy-Chairman, at Essex Quarter Sessions, of shop-breaking, and was sentenced to three months' imprisonment with hard labour.

F. Phillips for the appellant, who was present. The appellant was convicted with three others of shop-breaking at Southend on the night of May 17th—18th, 1919. The alleged shop-breaking took place about 2 o'clock in the morning. The only evidence against the appellant was that he went from London to Southend with the other three defendants on May 17th. He spent the day there with one or more of them, and was seen in the company of the three at Southend about midday and again at about 9 o'clock on that evening. The appellant called evidence to prove that he called at his sister's house at Plaistow about 10.30 o'clock the same night and stayed there about twenty minutes. From there he went to his home at Silvertown, where he arrived shortly before midnight. He went to bed, and did not get up until 9.30 the next morning (Sunday).

Naldrett for the Crown.

BRAY, J.: There is nothing in the evidence, except the fact that the appellant was in Southend in the company of the other

1919
30 *July.*

SAMUEL STANFORD.

Bray J.

defendants up to 9 o'clock on the night of the house-breaking, to connect him with the crime. We are of opinion that that was not sufficient, and the conviction ought to be quashed.

Conviction quashed.

Solicitors for the Appellant—*Mitchell, Lucas and Mitchell,* Stratford.

T. W. M.

DONALD BRATHERTON.

Mitigation of sentence in view of youth.

Appeal against sentence.

The appellant was convicted on July 2nd, 1919, before the Chairman, at Lancashire (Knutsford) Sessions, of obtaining by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

The appellant in person.

The Crown was not represented.

The LORD CHIEF JUSTICE: Looking at all the circumstances of this case we think that the sentence is too severe. It should be reduced to three months' imprisonment with hard labour, as this boy, aged eighteen, is not suitable for treatment in a Borstal institution.

Sentence reduced.

T. W. M.

BENJAMIN MYRO SMITH.

Appeal against conviction and sentence.

The appellant was convicted at the Warwickshire Assizes, at Birmingham, on July 7th, 1919, before Lord Coleridge J., of rape, and was sentenced to three years' penal servitude.

1919
30 *July*.

BENJAMIN MYRO SMITH.

Reading L.C.J. Bray J. Avory J.

E. T. Nelson for the appellant. The appellant was indicted for having carnal knowledge of a girl under sixteen years of age on September 26th, 1918; for rape of the same girl on October 22nd, 1918, and for indecent assault. The jury convicted the accused of rape. It is submitted that the verdict was against the weight of the evidence. The prosecutrix was employed by the appellant, who kept a shop. She alleged that on September 26th, when she was alone in the shop, the appellant asked her to go upstairs with him to copy a document, and that he then assaulted her. She further said that, on October 22nd, the date of the alleged rape, she was again alone in the shop, and the appellant again asked her to go upstairs with him; that he threw her down on the floor; that he then locked the door of the room and then, according to the prosecutrix, committed the offence of which he has been convicted. There was misdirection in that the learned judge did not properly and fully put the defence to the jury. He dwelt on the question of the prosecutrix's consent, which was not the defence at all. The learned judge did not draw the jury's attention to the inconsistencies and contradictions in the evidence of the prosecutrix, whose story was an extremely improbable one. It is submitted that it was a fabrication. The appellant's defence was a complete denial of the charges, but that defence was never put to the jury in the summing up.

Further, there was no corroboration of the prosecutrix's story. Where the only evidence against a prisoner accused of rape, the jury should be warned of the danger of acting upon such evidence without some corroboration. It is important to note that the prosecutrix made no complaint to anyone for about six days after the alleged offence was committed. It was only when her mother noticed the condition of her underclothing that she said something about it. The appellant ought not to have been convicted on the prosecutrix's evidence, and the conviction should be quashed. *Willie Hart*, 10 Cr. App. R. 176: 1914 was referred to. It is advisable that there should be corroboration in a material particular implicating the accused.

G. D. Roberts (*Roland Oliver* with him), for the Crown. There was ample corroboration of the prosecutrix's story if any such was necessary. It was established that there was the opportunity in that on the occasions in question the appellant and the prose-

1919
30 *July*.

BENJAMIN MYRO SMITH.

Reading L.C.J.
Bray J.
Avory J.

cutrix were alone in the house. That was one stage towards corroboration. There was further corroboration in the marks on the prosecutrix's clothing which first aroused her mother's suspicion. That was sufficient corroboration. *Clifford Dimes*, 7 Cr. App. R. 43; 76 J. P. 47: 1911.

The Court referred to *Baskerville's Case*, 12 Cr. App. R. 81; [1916] 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 Sol. Jo. 696: 1916.

[AVORY J.: In *Baskerville's Case* the Court said, (1916) 2 K. B. at p. 667; 12 Cr. App. R. at p. 91: "The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute."

The LORD CHIEF JUSTICE: Do you find any case where it is laid down that juries should not convict of rape unless there is corroboration implicating the accused?]

There is no authority for the proposition that corroboration of the prosecutrix's story is legally necessary, but a judge, in summing up, ought to warn the jury that it is dangerous to act on the prosecutrix's uncorroborated evidence in such cases. That was laid down in *Graham's Case*, 4 Cr. App. R. 218: 1910

The LORD CHIEF JUSTICE: This appeal involves the important question whether it is essential that, where a person is accused of rape, the prosecutrix's evidence should be corroborated in a material particular implicating the accused. We think it advisable that that point should be argued before a full Court. It is not possible to constitute a full Court during the present sittings, and the appeal will therefore be adjourned until the next. In the meantime the appellant will be released on his own bail in the sum of 100*l*., together with another surety for 100*l*.

T. W. M.

Solicitor for the Appellant—*H. E. Kay*, Manchester.

The Court (consisting of the Lord Chief Justice, and Darling and Avory JJ.) also sat on July 31st, 1919.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE SALTER.

WILLIAM SHADFORTH AND JOHN WILSON.

1919
28 *August.*

Recommendation of a medicine, drug, &c. as "good" for venereal disease may be "advice" within s. 1 (1) *of* 7 & 8 *Geo.* V. *c.* 21, *the Venereal Diseases Act*, 1917.

Appeals against conviction and sentence.

The appellant, William Shadforth, was convicted at the London Sessions, before the Deputy-Chairman, on August 6th, of giving advice and prescribing in connection with the treatment of venereal disease; advertising and offering to prescribe a remedy for venereal disease; and conspiring to give advice and prescribe remedies in contravention of the Venereal Diseases Act, 1917 (7 & 8 Geo. 5, c. 21), and was sentenced to four months' imprisonment in the second division, and ordered to pay the costs of the prosecution.

The appellant Wilson was convicted at the same Sessions, on the same date, of similar offences, and was sentenced to six weeks' imprisonment in the second division.

Patrick Hastings, K.C. (with him *Walter Frampton*) for the appellants, who were present. This case raises questions under the Venereal Diseases Act, 1917. Sect. 1 provides that "a person shall not, unless he is a duly qualified medical practitioner, for reward, either direct or indirect, treat any person for venereal disease or prescribe any remedy therefor, or give any advice in connection with the treatment thereof, whether the advice is given to the person to be treated or to any other person."

Sect. 2 provides that "a person shall not by any advertisement

1919
28 *August.*

WILLIAM SHADFORTH AND JOHN WILSON.

Reading
L.C.J.
Bray J.
Salter J.

or any public notice or announcement treat or offer to treat any person for venereal disease, or prescribe or offer to prescribe any remedy therefor, or offer to give or give any advice in connection with the treatment thereof."

The appellants were indicted for, though not being duly qualified medical practitioners, giving advice and prescribing in connection with the treatment of venereal disease; advertising and offering to prescribe a remedy; and conspiring to give advice and prescribe remedies in contravention of the Act. The appellant Shadforth was a duly qualified chemist (of long standing) carrying on business in an area to which the Act of 1917 applied, and the appellant Wilson was an assistant employed by Shadforth at his shop. The advertisements appeared in certain London newspapers and in a pamphlet entitled "Health News." They dealt with debility, neurasthenia, tuberculosis, syphilis and other ailments attributable to impure blood. The advertisements were long ones, and they contained a large number of formulæ and prescriptions for a great number of different diseases. Among the prescriptions mentioned in the advertisements was prescription 606.

[The LORD CHIEF JUSTICE: That is a concealed way of advertising the prescription.]

These advertisements had appeared for a number of years and no objection had been taken to them till these proceedings were begun. The remedies advertised were not quack remedies. The Act of 1917 was passed to protect the public against quacks whose so-called remedies did more harm than good. There was no suggestion that the remedies advertised by the appellant Shadforth were not good ones for the purposes stated in the advertisements. A police officer visited the appellant Shadforth's shop, which was an ordinary chemist's shop, and, having made a purchase, said to Wilson (Shadforth's assistant in the shop), "I have seen your advertisement of your 606 pills, are they any good in venereal cases?" The answer was in the affirmative. The officer thereupon purchased a box. There was not sufficient evidence of an offence against the Act. It was no offence under the Act to give the information asked for. That was not prescribing, nor was it giving advice.

1919
28 *August.*

WILLIAM SHADFORTH AND JOHN WILSON.

Reading L.C.J.
Bray J.
Salter J

If a man goes into a chemist's shop and asks the chemist to suggest a remedy for venereal disease, it is agreed that the chemist cannot comply with that request without infringing the provisions of the Act. But suppose a man asks for a specific thing, such as sandalwood oil, the chemist would be committing no offence under the Act by supplying the specific thing asked for. It was not an offence to sell patent medicines.

With regard to the sentences, the appellants are people of the highest character. What they have done they have done openly and they desired that the case should be taken to a higher Court to test the legality of what they were doing. They were amazed at the course which the learned judge took in sentencing them to imprisonment. This is the first case under the Act, to come before the higher Courts. The sentences of imprisonment should in the circumstances be reduced. Wilson, the second appellant, was a servant, acting under the instructions of the first appellant, and derived no pecuniary benefit from the transactions.

Travers Humphreys (with him *Roland Oliver*), for the respondents, was called on with regard to the sentences only. I have no instructions with regard to the sentences. It is possible that the Commissioner of Police may be of opinion that a conviction is sufficient in the present case. But the question whether the sentences shall be reduced is left entirely with the Court. I agree that the case of Wilson stands on a different footing to that of Shadforth.

The LORD CHIEF JUSTICE: It is unnecessary to go into the details of this case, but we are satisfied that the convictions were right, and that this Court cannot interfere. There was sufficient evidence of a recommendation amounting to advice within s. 1 and of an advertisement within s. 2 of the Act of 1917. Therefore the convictions must stand.

With regard to the sentences, we are impressed by the argument put forward by counsel for the appellants that this was the first prosecution in a superior court under the Act, and that the decision of the Court on the construction of the Act was desired. Our conclusion is that the sentence on Shadforth will be reduced to three weeks' imprisonment and a fine of 100*l.* imposed on him.

1919
28 *August.*

WILLIAM SHADFORTH AND JOHN WILSON.

Reading L.C.J.

Wilson's sentence will be reduced from six weeks' to three weeks' imprisonment. The effect of the reductions is that both appellants will be released to-day; Shadforth must pay the fine of 100*l.*, and the costs of the prosecution.

Sentences reduced: one sentence varied.

T. W. M.

Solicitors—*Neve, Beck and Kirby* for the Appellants.
Wontner & Sons for the Respondents.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

BENJAMIN MYRO SMITH (*a*).

1919
14 *October.*

On an indictment for rape when there is no corroboration of the prosecutrix's evidence implicating the accused on a material point a conviction may be unreasonable.

E. T. Nelson for the appellant, who was present. There was no corroboration of the evidence of the prosecutrix. She never screamed when the alleged offences were committed, nor did she make any complaint to anyone until her mother, on October 28th, four days after the date of the second alleged offence, having noticed the condition of her underclothing, questioned her. The defence was a complete denial of the charge. Therefore the prosecutrix's story ought not only to be consistent, but it ought to be corroborated in a material particular implicating the accused.

In olden times, where a woman brought a charge of this kind against a man she had to raise a hue and cry, and it was usually a defence if she did not do so. The modern rule admitting evidence of a complaint by the woman is a survival of the ancient practice. A charge of this kind is very easily made and very hard to refute.

East's *Pleas of the Crown*, Vol. I., c. 10, p. 445, and Phipson's *Law of Evidence*, 4th edition, p. 472, were referred to.

In *John Alexander Graham*, 4 Cr. App. R. 218; 74 J. P. 246, 1910, Pickford, J., pointed out the risk of acting on the uncorroborated evidence of the prosecutrix. The judge ought specifically to warn the jury of the danger of acting on her evidence alone. In this case no such warning was given. The learned judge assumed that there was corroboration; but what the learned judge regarded as corroboration was no corroboration at all.

(*a*) See p. 74, above.

1919
14 *October.*

BENJAMIN MYRO SMITH.

Reading L.C.J.
Bray J.
Lawrence J.
Avory J.
Sankey J.

With regard to the case of *Clifford Dimes*, 7 Cr. App. R. 43; 76 J. P. 47, 1911, it is submitted that it has not been established in this case that there was any opportunity.

Benjamin Brown, 6 Cr. App. R. 24, 1910, was also referred to.

Sir Archibald Bodkin (and *Roland Oliver*) for the Crown. It is submitted that a man may be convicted of rape on the testimony of the woman alone. In law there is no necessity for corroboration in the strict sense at all. Corroboration of the character indicated in *G. Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 Sol. Jo. 696; 12 Cr. App. R. 81, is not necessary in cases of this kind, because the woman is, from the nature of the case, not an accomplice. Since *Baskerville*, the word "corroboration" has acquired a special meaning, namely, that there must be outside independent testimony. In rape and offences against women there is no authority for the proposition that there must be other evidence implicating the accused. Evidence of consistency of conduct is all that is required: *Lillyman*, 1896, 2 Q. B. 167; 65 L. J. M. C. 195; 60 J. P. 536; 74 L. T. 730; 44 W. R. 654; 18 Cox, C. C. 346; and *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 92 L. T. 393; 53 W. R. 494; 21 T. L. R. 288.

The summing up must be regarded in the light of the speeches of counsel. See *Stoddart*, 2 Cr. App. R. 217; 25 T. L. R. 612, 1909; and *Arthur William Monk*, 7 Cr. App. R. 119, 1912.

W. H. Cooper, 10 Cr. App. R. 195, 1914, was also referred to.

Nelson replied.

THE LORD CHIEF JUSTICE: It is sufficient to say that we are of opinion that this verdict should not be allowed to stand, as it is unreasonable, having regard to the evidence. It therefore becomes unnecessary to decide the questions of law which have been argued before us.

The appellant was charged on three counts: (1) having carnal knowledge of a girl under the age of sixteen, (2) indecent assault, and (3) rape. The learned judge in summing up told the jury that if they found the prisoner guilty on the third count it would

1919
14 *October.*

BENJAMIN MYRO SMITH.

Reading L.C.J.

be unnecessary for them to deal with the other two counts. The appellant was found guilty of rape: he did not direct them, and no verdict was returned on the other two counts. We are of opinion that a trial ought now to take place on those two counts in respect of which no verdict has been found.

The conviction on the third count—that for rape—will be quashed, and the appellant must take his trial on the other two counts (*a*). He will be released on the same bail as before.

Conviction quashed.

Solicitor for the Appellant—*H. E. Kay*, Manchester.

T. W. M.

(*a*) The trial took place at Warwick Assizes on November 21st, and defendant was convicted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

1919
20 *October*.

Observations on detention in Borstal institutions and the terms of sentences.

The LORD CHIEF JUSTICE: The Court is struck with the number of applications for leave to appeal brought by lads from sixteen to twenty years of age. The applications have already been considered by a single judge. Out of nine applications, by way of appeals from the refusal of a judge to give leave to appeal against sentence, four are brought by youthful offenders who have been sentenced to be detained in a Borstal institution. This indicates the unfortunate prevalence, at the present time, of crime among young lads and also the strong dislike of these lads to be sentenced to three years' detention in a Borstal institution.

We desire to say that in our opinion the detention of these lads in a Borstal institution is in their best interests. It is the best possible way of dealing with these cases. However much the lads may dislike being kept for a period of three years, it affords them an opportunity of learning discipline and acquiring a trade, so that eventually they may be able to earn an honest living without consorting with thieves or other undesirable persons.

The Court desires it to be distinctly understood that these appeals can only succeed if the Court is clearly of opinion that the lad ought never to be sent to a Borstal institution. We are unanimously of the opinion that these Borstal institutions are of great assistance to the lads, and may—and often do—save them from a career of crime. The Court is of the opinion that, in the absence of exceptional circumstances, the term of three years is the right term, because that period of time gives the lads a chance which very often a shorter term does not afford.

SIDNEY ALFRED HUMPHREYS.

1919
20 *October*.

Reading
L.C.J.
Avory J.
Sankey J.

When there is evidence of a fight arising out of a quarrel, the direction must distinguish as carefully as possible between the persons who attack and those who are attacked.

Appeal against conviction.

The appellant was convicted, at the Middlesex Sessions, before the Chairman, on September 22nd, 1919, of unlawful wounding, and was sentenced to four months' imprisonment in the second division.

H. J. Turrell for the appellant, who was present.

H. D. Roome for the Crown.

The facts sufficiently appear from the judgment.

AVORY J.: To appreciate this appeal and the grounds of it, it is necessary to state that there was a distinct issue raised for the jury, whether on the night of the alleged unlawful wounding, August 13th, at the appellant's house in Shelley Road, Harlesden, the appellant stabbed two men as soon as they came downstairs, or whether, on the night in question, the appellant having come home with his wife from the Hippodrome, as the appellant alleged, the two men came downstairs and made an attack upon him in revenge for an allegation which the appellant's wife had made against a Mrs. Swain, who lived upstairs. The appellant and his wife had displeased the people upstairs by making imputations of immoral relations between the woman, Mrs. Swain, and Bennison, one of the prosecutors. The other prosecutor was a brother of Mrs. Swain. That was the issue before the jury, and anything which tended to shew that there was an unprovoked attack upon the appellant was quite relevant.

The appellant complains of two things—(1) that evidence was improperly excluded, and (2) misdirection.

The first point related to the evidence of a Mrs. Calcott. Evidence had been admitted that at the previous police court proceedings a threat was made by Mrs. Swain. A police constable had been called, and he had said that on that occasion Mrs. Swain, on entering the police station passed by the appellant's wife, who

1919
20 *October.*

SIDNEY ALFRED HUMPHREYS.

Avory J.

was standing in the waiting-room, and, turning to her, said, "I will kill you." Now, when Mrs. Calcott, who lived next door to the appellant, was tendered by the defence to give evidence of threats which had been made by Mrs. Swain towards the appellant's wife, the learned Chairman excluded the evidence. It was obviously relevant to shew that it was probable, and highly probable, that Mrs. Swain's party were the aggressors.

With regard to the misdirection, the learned Chairman put, against the appellant, a harsh interpretation on the appellant's evidence. The appellant, in his evidence, said that one of the prosecutors struck at his head with a hammer in the kitchen. The appellant's words were "struck at my head with a hammer." The learned Chairman, in his summing up, told the jury more than once that it was impossible to believe the appellant about the hammer. The learned Chairman said that if the appellant had been struck on the head with the hammer he would have been insensible. But the appellant never said that he was struck on the head with it. The result of this summing up was that the appellant's evidence was discredited without any foundation.

Finally, there was evidence in the case given by the police that the appellant's kitchen was discovered by them in a state of disorder, as if there had been fighting. That evidence tended to corroborate very strongly the appellant's allegation that the men attacked him in the kitchen, and yet the learned Chairman not only never made any reference to the state of the kitchen, but he discredited the evidence of a neighbour, Mrs. Jackson, on that point by saying that she had only given her statement to the solicitor two days before the trial. There was no ground for discrediting the evidence.

We think the jury must have been misled, and having regard to the exclusion of the evidence and the misdirection, the verdict was very unsatisfactory, and the conviction must be quashed.

Conviction quashed.

Solicitors for the Appellant—*H. J. Gamlin and Thomas.*

T. W. M.

ARTHUR JOHN BIGGIN.

1919
20 *October.*

Reading
L.C.J.
Avory J.
Sankey J.

"Prosecutor" in sub-s. f (ii) of s. 1 of the Criminal Evidence Act, 1898, means a living person.
Proviso to s. 4 of the Criminal Appeal Act not applied.

Appeal against conviction.

The appellant was convicted, at the Central Criminal Court, before Mr. Justice Darling, on September 16th, 1919, of manslaughter, and was sentenced to twelve months' imprisonment with hard labour.

J. P. Valetta (and *A. A. Baerlein*) for the appellant, who was present. Appellant was charged with the murder of a man named Gregory at Hendon on July 4th, 1919. He was convicted of manslaughter. The ground of the appeal is that s. 1, sub-s. (f) (ii), was transgressed by reason of the cross-examination of appellant by counsel for the prosecution. The very bad character of the dead man was common ground between the prosecution and the defence. No evidence was given or sought to be given of the character of appellant. The defence involved very grave imputations against the character of the dead man, and appellant went into the witness box and gave evidence in support of such imputations. Counsel for the prosecution put questions to appellant which tended to shew that he had committed the crime of obtaining money by false pretences.

Sect. (1) (f) of the Criminal Evidence Act, 1898, provides that "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to shew that he has committed or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature, or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

Appellant's story was that certain improper overtures were made to him by the dead man which he, appellant, refused to comply with. Thereupon the dead man proceeded to attack appellant,

1919
20 *October.*

ARTHUR JOHN BIGGIN.

Reading L.C.J. Avory J. Sankey J.

whose plea was that he did not use any more violence than was necessary to defend himself from such attacks. Counsel for the prosecution said he put the questions which were now objected to in order to satisfy the jury whether appellant was a truthful person or not. When objection was taken at the trial, the learned judge ruled that the cross-examination was admissible on the ground that it tested the credibility of the appellant.

[The LORD CHIEF JUSTICE: The cross-examination had no relevance to the charge on which the appellant was on his trial.]

No, it had no relevance to the charge of murder then before the Court. It is immaterial with what purpose the questions were put to the appellant, it is submitted that they were inadmissible whatever the purpose of putting them was. See *Arthur Thomas Eliis*, 1910, 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. Rep. 922; 74 J. P. 388; 26 T. L. R. 535; 22 Cox C. C. 330; 5 Cr. App. R. 41; *John Preston*, 1909, 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. Rep. 303; 73 J. P. 173; 25 T. L. R. 280; 21 Cox C. C. 773; 2 Cr. App. R. 24.

Referring to the words, "or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution," at the end of s. 1 (f) (ii) of the Criminal Evidence Act, 1898, Channell J., in delivering the judgment of the Court in *J. Preston*, said: "The latter part of the section is that which is material to consider in the present case. It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with a view of shewing that he has such a bad character that the jury ought not to rely on his evidence."

It was said that the dead man was the "prosecutor" within the meaning of the sub-section, and that the character of

the dead man had been assailed by appellant. It is submitted, however, that the dead man was not the "prosecutor." The words "prosecutor or the witnesses for the prosecution" mean somebody who gives evidence at the trial. See *J. Preston* and the cases therein cited, *e.g.*, *Bridgwater*, 1905, 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 21 T. L. R. 69; 20 Cox C. C. 737, 1904. See also *Arthur Westfall*, 76 J. P. 335; 107 L. T. 463; 23 Cox C. C. 185; 28 T. L. R. 297; 7 Cr. App. R. 176, 1912. The imputation referred to in the sub-section must be against one or more of the witnesses called for the prosecution and not merely against persons not called as witnesses.

Hamilton J., in *Arthur Westfall*, 7 Cr. App. R. at p. 178, said: "The prisoner had made statements at the police court, and he repeated them in his evidence at the trial, to the effect that he had been unfairly deprived of the opportunity of calling a witness at the police court whom he thought important for his defence, and that at the police station a detective had coached the prosecutor as to the sum of money which he had lost by the robbery, and that when he protested an inspector had struck him in the face with a book. No one would have credited the learned magistrate with having done anything of the kind. The section does not refer to imputations on the magistrate, but only to those on the character of the prosecutor or the witnesses for the prosecution. But no one of the police officers against whom the appellant made these allegations were witnesses at all, though they were instrumental in getting up the case for the prosecution. So the ground upon which the learned judge acted does not come within the words of the section."

So far as authority is available on the point, it has been contemplated by judges that the character of some living person who has given evidence must have been attacked before cross-examination with regard to the character of the accused can be allowed.

Eustace Fulton for the prosecution. It is submitted that *R.* v. *Westfall* does not establish the proposition put forward. In that case the imputations were made against persons who were not witnesses and who could not have been covered by the word "prosecutor." The dead man is the prosecutor for the purposes of s. 1 of the Criminal Evidence Act, 1898. The purpose of the section

1919
20 *October.*

ARTHUR JOHN BIGGIN.

Reading
L.C.J.
Avory J.
Sankey J.

was to give an accused person giving evidence immunity from cross-examination to credit only if he is content to allow his evidence to stand upon its own inherent probabilities. The statute does not permit an accused person to conceal his own character from the jury and, at the same time, to seek to give weight to his evidence by suggesting that the conduct or character of the witnesses for the prosecution makes him a more reliable witness than they. Nor does it permit him under cover of his immunity to suggest that the conduct or character of the prosecutor (who for this purpose, it is submitted, is the person aggrieved) is such that the accusation is tainted and not worthy of the same consideration as the denial of the accused. Suppose the man had not died and appellant had been charged with some lesser offence, it could not be said that the man attacked would not be the prosecutor. Is it to be argued that the man's death affects the position, so as to give the prisoner an immunity which he would not have enjoyed if the man attacked had survived?

"Prosecutor" is not a term of art. The word is defined in various statutes in different ways for different purposes. In this statute it is not defined, and the intent and purpose of the statute must be looked at to find its meaning. The origin of the right of a person to prosecute is his personal wrong. The statute was never intended to give an accused person who has succeeded in killing a man an immunity which he would not have enjoyed if he had not succeeded in killing him.

[THE LORD CHIEF JUSTICE: The imputations made on the character of the dead man and on his manner of living were necessary for the defence and did not travel outside what was necessary. The cross-examination related to matters which had nothing whatever to do with the charge on which the appellant was being tried.

AVORY J.: A person charged with rape who pleads that the woman consented, makes an imputation on the character of the woman, and yet the mere allegation of the defence of consent in the case of rape is not sufficient to oust the protection of the statute.]

The fact that these imputations were necessary for the defence has been held to be immaterial in *Bertram Hudson*, 1912,

1919
20 *October.*

ARTHUR JOHN BIGGIN.

Reading
L.C.J.
Avory J.
Sankey J.

2 K. B. 464, 470; 81 L. J. K. B. 861; 107 L. T. Rep. 31; 76 J. P. 421; 28 T. L. R. 459; 23 Cox C. C. 61; 56 Sol. J. 574, 1912; 7 Cr. App. R. 256, 262. In that case the following passage occurs near the end of the judgment: "We think that the words of the section, 'unless the nature or the conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence,' or other similar words."

[AVORY J.: *Bertram Hudson* was distinguished from the cases of *Bridgwater* and *Preston*.]

Assuming that the dead man was not the prosecutor, who then was the prosecutor in this case? Who was it that the statute intended in a case of murder to be the prosecutor whose character was not to be assailed with impunity? It cannot be the King nor the Public Prosecutor, nor the police officer who signed the charge sheet. There was no one left but the dead man.

[The LORD CHIEF JUSTICE: Can a person be a prosecutor who is never in a position to exercise the will to prosecute?]

He may be for the purposes of the Act of 1898.

[The LORD CHIEF JUSTICE: Is there any public mischief that might arise if the statute were strictly construed?]

Suppose an accused person were a habitual blackmailer—a common thing where there are sodomitical practices—and there were many convictions against him, it would be a grave miscarriage of justice if that man went into the box to give evidence on his own behalf and made imputations on the character of the dead man, and was himself to be immune from cross-examination with regard to his previous convictions. It is not difficult to conceive a case where such imputations might be wholly false and deliberately invented to deceive.

There is a further question, namely, whether the proviso to s. 4 of the Criminal Appeal Act, 1907, applies. The jury could not have been influenced by the attacks on the appellant's

1913
20 *October.*

ARTHUR JOHN BIGGIN.

Reading L.C.J.
Avory J.
Sankey J.

character, because they acquitted of murder, only finding the degree of violence used so excessive as to amount to manslaughter. On this question the cross-examination complained of could not have influenced them.

Valetta in reply. The principle on which s. 4 of the Criminal Appeal Act, 1907, is applied is laid down in *Frederick Rodley*, 1913, 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 29 T. L. R. 700; 23 Cox C. C. 574; 58 S. J. 51; 9 Cr. App. R. 69. It is impossible for the Court to say that the jury were not influenced by the evidence obtained by this cross-examination.

The LORD CHIEF JUSTICE: The appellant appeals to this Court on the ground that cross-examination was improperly addressed to him contrary to the provisions of s. 1 (f) of the Criminal Evidence Act, 1898. The deceased man, Gregory, was found dead on the afternoon of July 4th in a wineshop at Hendon. The appellant in a statement which he made to the police admitted that he killed Gregory, but said that he did it because Gregory made improper overtures to him, and on his (the appellant's) refusal to comply with them, violently attacked him. The appellant said, further, that "At the time I was struggling with Gregory I felt that if I did not do him in he would do me in." In substance the appellant's defence was that he did the acts of violence in consequence of the improper overtures and of the violence of the deceased man.

It is quite clear, as the learned judge said in the course of his summing up to the jury, that if the appellant was really placed in the dilemma that either Gregory must kill him or he must kill Gregory, the jury would be justified in returning a verdict of not guilty. The learned judge pointed out, however, that if he exceeded the necessities of the occasion in resisting violence, that would justify a verdict of manslaughter.

Now that was the case that had to be tried. It is not necessary to travel in detail through the facts further than to say that during the cross-examination of the appellant a series of questions were addressed to him by counsel for the prosecution, which had the effect of extracting an admission from the appellant that he had once obtained money by false misrepresentations, in other words, by

1919
20 *October*.

ARTHUR JOHN BIGGIN.

Reading
L.C.J.

false pretences. There were a number of questions which had no relevance whatever to the charge of murder or of manslaughter. They related only to other transactions by the appellant, and the answers involved admissions by the appellant of the commission of a crime other than that which was the subject of the trial.

Objection was taken, but the learned judge came to the conclusion that the cross-examination was admissible on the two grounds put forward by the Crown. The first ground was that the defence made imputations against the character of the prosecutor, who in this case, it was stated, was the dead man. The imputations were that he had made these disgraceful overtures. Now, we are of opinion that the dead man was not the prosecutor. He had neither the will nor the intention to prosecute. He was dead and could take no part in the proceedings. The Court is of opinion that the cross-examination cannot be admitted on the first ground.

It has been argued that Parliament must have intended to include a case like the present one, where a man was killed and the defence involved attacks on his character. It is sufficient to say that Parliament has not used language which would justify the Court in saying that the dead man was the prosecutor. The Court is bound by the exact language used in the section, and it appears to us that the first ground on which this cross-examination was admitted fails.

Secondly, it was said that the cross-examination was admissible to ascertain whether the witness was telling the truth, that is, as it seems to us, in this particular case, having regard to the circumstances of the case, to test the credibility of the witness. The Crown claims to be entitled to cross-examine the witness with regard to other matters which were irrelevant to the charge before the Court. This proposition is contrary to the spirit and intention, and even the language, of the Criminal Evidence Act, 1898, and the Court is clearly of opinion that the cross-examination was not admissible in the circumstances of this case.

We have been pressed by certain observations made at the end of the judgment in *Bertram Hudson*, 7 Cr. App. R. at p. 262: "We think that the words of the section 'unless the nature and conduct of the defence is such as to involve imputations, etc.,' must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words

1919
20 *October.*

ARTHUR JOHN BIGGIN.

Reading L.C.J.

'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence,' or other similar words."

We find nothing in those observations inconsistent with the decision to which we are now coming. In that case the Court was considering a different matter, and Lord Alverstone C.J. cited a passage from the judgment of Channell J. in *Preston:* "The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within s. 1, sub-s. (f) (ii) of the Act as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony. If that were the nature of the imputation the prisoner could be cross-examined as to his character." The decision in *Preston's* case was approved by the Court, and we are giving effect to those observations in the present case.

There is another question, namely, whether the Court should apply the proviso in s. 4 of the Criminal Appeal Act, 1907. On considering all the circumstances of this case, we are not satisfied that the jury would have convicted the appellant if this cross-examination had not taken place or if they had been told to pay no attention to it. On the defence put forward by the appellant, namely, that he killed Gregory in defence of his own life, the appellant was entitled to an acquittal if it was accepted by the jury. We are unable to say that the jury would not have accepted the statement of the appellant if they had not heard the cross-examination. The conviction must be quashed.

Conviction quashed.

Solicitors for Appellant—*Taylor, Stanbury & Co.*, agents for *Branson & Son*, Sheffield.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE SANKEY.

HARRY RATCLIFFE.

1919
3 *November.*

An interrogation of the defendant by the judge tending to suggest that the latter has information to the former's discredit or that the latter has been guilty of an offence (other than that then being tried, if the defendant has not let in such evidence) is an infringement of s. 1 (*f*) *of the Criminal Evidence Act,* 1898. *Proviso to s.* 4 *of the Criminal Appeal Act not applied.*

Defendant's evidence that he has a discharge book from his ship is not putting his character in issue within that section.

Appeal against conviction.

Appellant was convicted of shopbreaking, on the 8th of October, 1919, at the Liverpool City Sessions, before the Recorder, and was sentenced to twelve months' imprisonment with hard labour.

Herbert Metcalfe for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant and three other men were charged with shopbreaking and larceny. The evidence of the police was that the appellant and another man were caught red-handed inside a shop in Liverpool while they were engaged in looting it during some riots which took place in that city. Appellant's story was that he was never inside the shop at all, but that he was standing among the crowd a short distance away from the shop, and that he had nothing whatever to do with the looting, and that the police had made a mistake, and that he was pushed into a corner by the police during the excitement caused by the conduct of the mob and there arrested.

The ground of the appeal was that the learned Recorder during the trial put questions to the appellant which infringed s. 1 (f) of the Criminal Evidence Act, 1898. The section provides: "A person charged and called as a witness . . . . shall not be asked

1919
3 *November.*

HARRY RATCLIFFE.

Reading L.C.J.
Coleridge J.
Sankey J.

and if asked shall not be required to answer any question tending to shew that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character unless . . ." certain things are done, none of which conditions apply in the present case. Appellant had not put his character in issue. He was undefended.

Appellant, in giving evidence, said that he was in the Merchant Service, and that he had only arrived home and had gone to Leeds on the day before being charged with the offence. He then said that he arrived at Liverpool from Leeds just before 11 o'clock on the day on which he was charged. He mentioned that he had a discharge book from his ship, meaning that this would show that what he said was correct. Certain questions were then put to him by the learned Recorder as follows:

"The Recorder: To prove what?

Defendant: To prove that I arrived from Leeds and came back to Liverpool.

The Recorder: I do not follow what you want to prove about your character.

Defendant: I have got my discharge book to prove I had come back from Boston.

The Recorder: If you only want to prove that, well and good, but do you want to go beyond that?

Defendant: I have a letter from my father to prove that I left his house and arrived there the day previous to being charged.

The Recorder: That may be so."

And then later on the dialogue was continued:

"The Recorder: Are you wanting to suggest to the jury that you spend all your time in the Merchant Service?

Defendant: Certainly not.

The Recorder: You are talking as if you did, and I shall have to ask you some questions if you do, you know. How long have you been in the Merchant Service roughly?

In about eight or nine ships.

How many months have you been altogether in the Merchant Service?

Ten months. This year I have been about five weeks.

1919
3 *November.*

HARRY RATCLIFFE.

Reading
L.C.J.
Coleridge J.
Sankey J.

In this year, 1919, you have been in the Merchant Service about five weeks?

Yes.

Last year?

I was in the army then.

In 1918?

Yes.

At what date in 1918 were you in the army?

I went back to my regiment on the 23rd of October I think it was.

You went back to your regiment on the 23rd of October, 1918?

Yes, sir, I think it was about that.

I do not think it was.

I am positive, sir; if you look carefully you will prove it.

No, I do not think so; you are wrong.

I am positive, sir, quite positive it was October, 1918.

You went back to your regiment in October, 1918?

Positive, sir.

What was your regiment?

The Manchester Regiment. I went to Cleethorpes, and was there until January.

Were you in the Merchant Service in 1916?

I was in the army again.

All 1916 in the army?

No.

In 1917?

In 1917 I was in France some part of the time.

Were you in the army all 1916, and in 1918? Were you in France then?

I went to France in October, 1918.

Were you in France in the early part of the year?

No.

Are you sure you were in the army in 1916?

No, sir, I was not.

The Recorder: No, I know you were not. I cannot let you give the jury the impression that you are a merchant seaman and a soldier all the time, and just passing through Liverpool. I do not want to go further into the matter, but I warn you that if you pursue the matter I shall go into it further."

1919
3 *November*.

HARRY RATCLIFFE.

Reading L.C.J.
Coleridge J.
Sankey J.

A co-defendant against whom the evidence was somewhat similar, but who was not asked questions like these, was acquitted.

Counsel was stopped.

R. K. Chappell for the Crown. The Recorder's questions were directed to disproving the suggestion that appellant had served in the army and in the Merchant Service the length of time which he asserted he had served. It is submitted, however, that no substantial miscarriage of justice occurred, and the Court should dismiss the appeal under the proviso to s. 4 of the Criminal Appeal Act.

Metcalfe replied,

The LORD CHIEF JUSTICE: This case raises a question whether a series of interrogatories put by the learned Recorder to the appellant in the witness box infringed s. 1 (f) of the Criminal Evidence Act, 1898.

The appellant and three other men were charged with shop-breaking, larceny, and receiving. The alleged offences took place during riots in Liverpool when there was looting of shops. The police evidence was that the appellant was one of two men caught red-handed in the shop, and that the police took the men from the shop out into the street and to the police station. The case for the appellant was that he was standing outside the shop and had nothing to do with the stealing or the looting; he was merely standing by and was pushed into a corner and arrested by the police.

The issue for the jury was whether they were satisfied beyond reasonable doubt that the appellant was one of the two men who had been arrested in the shop. The appellant stated in the witness box that he had been to sea as a fireman, and he concluded his statement by saying that he had a good character from the ship. The learned Recorder then put to him a series of questions about his having been in the army and in the Merchant Service. [His Lordship referred in detail to the questions set out above.]

It is important to bear in mind what the law relating to the giving of evidence by the prisoner is. The Criminal Evidence Act, 1898, by s. 1, protects an accused person giving evidence from questions tending to shew that he has committed or been convicted of offences other than the one with which he is then charged,

1919
3 *November.*

HARRY RATCLIFFE.

Reading L.C.J.

or is of bad character, unless he has himself put his character in issue, or the nature or conduct of the defence involves imputations on the character of the prosecutor or the witnesses for the prosecution. The Court has on many occasions had to consider that section, and we have dealt with it quite recently. [See *Arthur John Biggin*, above, p. 87.] The appellant in this case had not put his character in issue, nor made any imputation on the character of the prosecutor or witnesses for the prosecution. Therefore he was within the protection of that section.

The learned Recorder proceeded to put a series of questions to the appellant. There are some eighteen questions which, in our opinion, are questions tending to show that this man had been convicted of other offences. It is impossible to read the questions without coming to the conclusion that those who heard them must have thought that the Recorder had some information which was adverse to the appellant, and which reflected on the appellant to his discredit. We have come to the conclusion that that series of questions was an infringement of s. 1 of the Criminal Evidence Act.

In *Ellis*, 1910, 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535; 5 Cr. A. R. 41, this matter was considered. Applying the principle of that case to the present, the conclusion at which we are compelled to arrive is that these questions were questions tending to shew that the appellant had committed another offence.

Now counsel for the Crown relies on the proviso to s. 4 of the Criminal Appeal Act, 1907, and argues that notwithstanding the irregularity, no substantial miscarriage of justice has actually occurred. We are unable to arrive at that conclusion. We cannot say that we are satisfied that assuming that the improper questions had not been put, the jury would nevertheless have been bound to come to the same conclusion. The principle has been often laid down that the fact that the jury might have convicted is not sufficient to justify us in applying the proviso. Having regard to the circumstances of this case, we cannot say that the jury were bound to convict if these questions had not been put to the appellant. For these reasons the conviction must be quashed.

Conviction quashed.

T. W. M.

1919
3 *November.*

Reading
L.C.J.
Coleridge J.
Sankey J.

HAROLD JOHNSON.

Severity of Sentence.

Appeal against sentence by leave of the full Court.

Appellant was convicted of larceny, at the Central Criminal Court, before the Recorder, on September 12th, 1919, and sentenced to eighteen months' imprisonment with hard labour.

Appellant in person.

No counsel appeared for the prosecution.

The Lord Chief Justice: The appellant was convicted of stealing a trunk. It is to be observed that he is young, only eighteen years of age, but he is not recommended for Borstal and therefore we cannot deal with him in that way. There are no previous convictions against him, and we think the sentence is too severe in the circumstances. It will be reduced to six months, and as we gave leave to appeal, the sentence will date from conviction.

Sentence reduced.

T. W. M.

JOHN CASEY.

Mitigation of sentence in view of meritorious military service.

Appeal against sentence.

Appellant was convicted on the 24th of September, 1919, at Oldham Borough Sessions, before the Recorder, as an incorrigible rogue, and was on the 10th October, 1919, sentenced to twelve months' imprisonment with hard labour and twenty-five strokes of the birch.

Appellant was not present.

No counsel appeared.

Lord Coleridge J.: The appellant had been previously sentenced as an incorrigible rogue, but in the interval since his last sentence he had been to Mesopotamia, and had been on active ser-

1919
3 *November.*

JOHN CASEY.

Coleridge J.

vice from December, 1914, until September, 1919, and during that time no complaint was made against him. The Recorder in sentencing him said that he had been convicted eight times of acts of indecency. The Recorder apparently disregarded the appellant's record of military service. There was no reason to doubt the appellant's statements, and the sentence seems to us to have been a harsh sentence on a man who had been fighting for the country for 4½ years without a blot on his character. We consider that it was severe to sentence a returned soldier without inquiry, and without taking into account what he had done towards wiping out the memory of his former misdeeds. The Court will remit the corporal punishment, and the sentence of twelve months' imprisonment with hard labour will be reduced to six months' imprisonment with hard labour.

Sentence reduced.

T. W. M.

SYDNEY EDWARD SMITH.

On the trial of an indictment under s. 7 (a) of the Forgery Act, 1913, there must be a direction on the issue whether defendant knew the instrument in question was forged.

But there may be an intent to defraud, under that section, although defendant was legally entitled to what he obtained by the instrument.

Evidence that statements in the instrument alleged to be forged are untrue, is, semble, *irrelevant on such a trial.*

Appeal against conviction on certificate.

Appellant was convicted on the 13th October, 1919, at the Wiltshire Assizes, before Mr. Justice Darling, of obtaining money from a clerk in the employment of the Ministry of Labour under a forged instrument, and was sentenced to two months' imprisonment in the second division.

Lloyd-Barrow for the appellant (under s. 10 of the Criminal Appeal Act), who was on bail.

T. H. Parr for the Crown.

The LORD CHIEF JUSTICE: The appellant was charged with

1919
3 *November.*

SYDNEY EDWARD SMITH.

Reading L.C.J.

an offence under s. 7 of the Forgery Act, 1913, of feloniously obtaining, with intent to defraud, money under a forged instrument, knowing the same to be forged. That was the only offence charged against him. It was established by the evidence that the appellant applied to the Labour Exchange at Salisbury for an out-of-work donation. A form was handed to him and he was told to get it certified by a justice of the peace. The certificate of a justice of the peace was necessary before the out-of-work donation could be obtained. He returned to the Exchange with a certificate purporting to be signed by a Mr. Barnes, a justice of the peace, and he thereupon received the out-of-work donation.

There was no evidence that he was not entitled to the out-of-work donation if a genuine certificate had been supplied. But it was established that the certificate was not signed by Mr. Barnes. Mr. Barnes gave evidence that he did not sign the document and knew nothing about it. The appellant stated that he believed the document was signed by Mr. Barnes. The appellant went into the witness box and said that he had called to see Mr. Barnes several times, but had failed to see him. He went again to Mr. Barnes's house, and as he was going he saw a man emerging from the garden gate of Mr. Barnes's house. Going up to this man the appellant said, "I want Mr. Barnes." The man replied that he was Mr. Barnes, and the appellant then told him what he wanted, and the man signed the form in the name of W. E. Barnes. The appellant had not seen Mr. Barnes before this, and he had no reason to disbelieve that he was Mr. Barnes, the magistrate. This was the story put forward by the appellant. There was no evidence who the man really was who signed the document. But the document was a forged document.

The appellant throughout the trial rested his case on his ignorance of the fact that the document was a forged document. Two points were made against the defendant, (1) that he knew that the document was not signed by Mr. Barnes, and therefore that it was a forged document, and (2) that he knew Mr. Barnes had no knowledge of him, and could not truly certify the necessary facts. During the evidence and the discussion on it these two points were treated as evidence of the use of a forged document. In summing up the learned judge asked the jury whether they believed the appellant's story. He asked them: "Do you believe for a moment that this thing happened?"

1919
3 *November.*

SYDNEY EDWARD SMITH.

Reading L.C.J.

Now if the case had stopped there, there would have been no ground on which to criticise the summing up. But the learned judge went on to direct the jury that they could convict the appellant on the ground that the statements in the document could not be true. Now it is important to observe that this latter offence was not the subject of the indictment, and that the only charge which the appellant had to answer was the one under s. 7 of the Forgery Act, 1913. It must be established that the money was obtained or that an attempt was made to obtain it under a document, knowing that the same was a forged document and with intent to defraud. The first question was whether the appellant knew that the document was forged; that question was never left to the jury. It was assumed that he knew that the document was forged. The other question was whether an intent to defraud might be inferred although the appellant might be lawfully entitled—as he was in this case—to draw the out-of-work donation. We have decided that question in the affirmative. The jury may infer an intent to defraud although it is used to support a claim which is genuine. The view of the learned judge on that point was right. But that does not dispose of the case. The question whether the appellant knew that the document was forged, which must be decided against him before he can be properly convicted, was essentially a question of fact for the jury, and that question was never left to them. For these reasons the conviction must be quashed.

Conviction quashed.

T. W. M.

ALBERT HENRY TATE.

Mitigation of sentence in view of meritorious military service.

Appeal against sentence.

Appellant was convicted of larceny, on the 17th of October, 1919, at Middlesbrough Sessions, before the Recorder, and was sentenced to five years' penal servitude.

Appellant in person.

Hedley for the respondents.

1919
3 *November.*

ALBERT HENRY TATE.

Sankey J.

SANKEY J.: The Appellant pleaded guilty to stealing a bicycle and a sum of money. He had previously been convicted several times, and on at least two occasions had been sentenced to three years' penal servitude. He joined the army soon after the outbreak of the war, and served in France for some time, and during that time he had a very excellent character. He obtained special leave to come home from France, and on that occasion he found on his arrival that the young lady who was the object of his affections would have nothing to do with him because of his past life. It was while he was on leave that he committed the thefts. I do not say that they are not serious offences, although one of them was that of stealing only 8*s.* 4*d.* Then he went back to the army in France and bore an excellent character in the army. When he came home again he obtained employment, and it was while he was at this work that the offences which he had committed were discovered. Although he has a very bad record, we feel that he made good on two occasions while serving in the army, and that he did make an endeavour to turn over a new leaf. In these circumstances the Court hopes that a reduction of the sentence will induce him to remain for the rest of his life the same honest man that he was when serving in the army. The sentence will be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

Solicitors for the Respondents—*Hoggett and Bacon,* Middlesbrough.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SALTER.

ROBERT LENTON.

1919
10 *November.*

If a jury, after retiring to consider their verdict, address a question in writing to the Bench, it should be asked publicly.

Appeal against conviction.

Appellant was convicted, at the Surrey Sessions, at Kingston, on October 15th, 1919, before the Chairman, of receiving a stolen motor car, and was sentenced to twelve months' imprisonment with hard labour.

Temple Martin for the appellant. The first ground of appeal is that the trial was irregular. After the jury had retired to consider their verdict they sent a written question to the Chairman, who, without mentioning that fact and without reading out the question in open Court or communicating it to appellant's counsel, told the foreman of the jury that the case was closed and no further evidence could be received. The question related to the financial position of appellant, and had he been given the opportunity of calling the evidence asked for by the jury it is submitted that it would have had a favourable effect.

Appellant, in giving evidence, accounted for part of the money which made up the 215*l.* which he paid for the motor car in question by saying that he had cashed a cheque which his brother had given him. The written question which the jury sent to the learned Chairman was as follows: "Can counsel for the defence produce the cashed cheque referred to in evidence as having been

1919
10 *November*.

ROBERT LEATON.

Reading L.C.J.
Coleridge J.
Salter J.

received from his brother, and will the prisoner state at which bank it was drawn on?"

It is always laid down that if any further assistance is required by the jury after the case is closed, it must be given in open Court by the judge in the presence of the accused. Appellant was given no opportunity of dealing at the time with this question, and he now desires to call further evidence dealing with it.

The Court, in the particular circumstances of the case, gave leave to call the additional evidence, limited to answering the jury's question.

Appellant's brother was accordingly called, examined and cross-examined.

Fox-Davies, for the Crown, was not called on.

The LORD CHIEF JUSTICE: The real question for the jury was whether they accepted the appellant's story how he came to be in possession of the stolen motor car as a reasonable explanation. . . . The prisoner gave evidence. . . . After the case was closed and the jury had retired to consider their verdict, the foreman of the jury brought to the Chairman a written question. Apparently the question was not read out in open Court. The learned Chairman then said that the trial could not be re-opened. Although we think it would have been better to read the question out in open Court, yet we are quite unable to accept the argument that the Chairman's refusal to re-open the case was a mistrial or miscarriage of justice. No complaint, therefore, can be made on that ground.

We will not allow cases to be retried in this Court. But there may be circumstances in which it is desirable that we should hear further evidence. We came to the conclusion in the peculiar circumstances of this case that we should hear the additional evidence. We have heard it, and we have come to the conclusion that it does not carry the defence to the length suggested by counsel. We have heard evidence of four cheques, amounting in the aggregate to 651*l.* 5*s.* 0*d.*, which the appellant received from his brother. But the last of those cheques was drawn on August 13th and cashed on the following day, and there is no evidence of any transaction after that date between appellant and

his brother. Nor is there evidence to connect the purchase of the car at the beginning of September with the cashing of the cheque on the brother's account. With regard to the jury's question, it is to be observed that the cheque could not be produced then, and it cannot be produced now. . . . The appeal must be dismissed.

1919
10 *November.*

ROBERT LENTON.

Reading L.C.J.

Appeal dismissed.

Solicitors for Appellant—*Peard & Son*, Croydon.

JOHN THOMAS WILLIAMS.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on October 20th, 1919, at Carlisle Assizes, before Mr. Justice McCardie, of bigamy, and was sentenced to fifteen months' imprisonment with hard labour.

Appellant was not present.

No counsel appeared on either side.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to bigamy. He was first married in 1902, and lived happily with his wife for some years. He joined the army and was discharged in 1917 for some reason which did not reflect any discredit on him. It was due to ill-health or wounds. He afterwards went to Gretna, where he was employed at a factory. There he met a young woman to whom he represented himself as a single man. He had intercourse with her and she became pregnant. He joined the Russian relief force, and the young woman came to him and begged him not to desert her as she was in trouble. He went through the form of marriage with her with the idea that it would be of some comfort to her. This is not a case in which he had

1919
10 *November.*

JOHN THOMAS WILLIAMS.

Reading L.C.J.

seduced the woman under the promise of marriage. It is true it is not a light offence, but, nevertheless, in the circumstances now brought before us we have come to the conclusion that the sentence ought to be reduced. The sentence will be reduced from fifteen months' to eight months' imprisonment.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE AND MR. JUSTICE SANKEY.

ALBERT EDWARD QUARTERMAINE.

1919
17 *November.*

A judge is entitled to suggest that the minority of a jury may subordinate their view to that of a substantial majority.

Application for leave to appeal against conviction and sentence.

Applicant was convicted, at the Central Criminal Court, on October 23rd, 1919, before Mr. Justice Salter, of manslaughter, and was sentenced to six months' imprisonment.

Foote, K.C. (and *H. J. Turrell*) for the applicant, who was not present. After the jury had retired to consider their verdict, they returned to Court after an interval of half an hour and said that they could not agree, whereupon the learned judge said: "I always think that when a criminal trial ends in a disagreement of the jury, it is a very unfortunate result; it casts no credit upon anybody concerned, and public time is occupied, and public money is spent without effect. Unless you feel it is quite hopeless that you can possibly agree, I would be glad if you would try again. The only observation I would make is that, of course, the prosecution must prove their case, and if the jury are evenly divided (*sic*)—if a substantial number take one view, as a rule it is expedient that the others should subordinate their views to the majority. I should be very sorry if this trial ended without result. Would you retire for a little further time? I will wait here and see if you can arrive at a verdict." It is submitted that the effect of those words was that the jury should return a majority verdict. That was a very dangerous thing to tell the jury, and the verdict ought to be quashed.

No counsel appeared for the Crown.

1919
17 *November.*

ALBERT EDWARD QUARTERMAINE.

Sankey J.

SANKEY J.: If the effect of the words of the learned judge was that the verdict of the majority must be taken, there might be something to be considered. But that was not the effect of his words. The learned judge said, "unless you feel it is quite hopeless that you can possibly agree, I would be glad if you would try again. The only observation I would make is that, of course, the prosecution must prove their case, and . . . if a substantial number take one view, as a rule it is expedient that the others should subordinate their views to the majority." But that does not mean that they should return a majority verdict. We are of opinion that no injustice has been done at all, and the application must be dismissed.

Application dismissed.

Solicitors—*H. J. Gamlin and Thomas.*

T. W. M.

ARTHUR BEARD.

"Constructive" murder.

Violence in furtherance of rape resulting in death may amount to murder.

The law on the reduction of murder to manslaughter by reason of intoxication is correctly laid down in Meade, 2 *Cr. App. R.* 54 : 1909, *and the jury should be directed accordingly.*

Proviso to s. 4 *of the Criminal Appeal Act not applied.*

Appeal against conviction on a point of law.

Appellant was convicted at Chester Assizes, before Mr. Justice Bailhache, on October 24th, 1919, of murder, and was sentenced to death

Artemus Jones, K.C. (and *Austin Jones*) for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of the appeal is misdirection. Two points arise: (1) how far the doctrine of constructive murder applies to the case of a man who committed a rape on a girl and in order to prevent her screaming, put his hand on her mouth, and in so doing killed her by suffocation, and (2) how far the condition of drunkenness in which the prisoner was at the time he did the act, rebutted the presumption of malice aforethought. It is submitted that the learned judge misdirected the jury on both points.

1919
17 *November.*

ARTHUR BEARD.

Reading
L.C.J.
Coleridge J.
Sankey J.

Appellant was convicted of the wilful murder of Ivy Wood, a girl of thirteen years of age, on July 25th. He was a night watchman at the Carr Field Mill, Hyde, Cheshire. In a statement to the Chief Constable of Hyde on the morning of July 26th, appellant said he went on duty at the mill at 5.30 p.m. on July 25th, and stayed there until 7 p.m. He then left and returned about 10.45 p.m. He said he went on his rounds about 1.15 a.m., and found the body of the girl near the dining hall. On July 27th, he made another statement to the Chief Inspector of Police, in which he said, "I think I asked her to give me a kiss, or something like that, and she started to run towards the lodge. I caught hold of her and tried to get one; I took her into the room where the pump is. We had a bit of a struggle, and then I seemed to lose my senses. I got her down, and she seemed to get unconscious. I left her on the ground and went up the yard. . . ." On examination it was found that the girl had been outraged. He also said, "I should not have injured the girl in any way if I had not been sodden and mad with drink." The learned judge directed the jury that if the appellant, when he was violating the girl, had killed her while trying to prevent her screaming, or to overcome her resistance, he was guilty of murder. But there was no evidence of deliberate strangulation. The marks on the girl's face and neck shewed that all that the appellant had done was to put his hand over her mouth to prevent her crying out. It was not suggested that the appellant had gripped the girl by the throat and in doing so had strangled her.

Horsey, 3 F. & F. 287 (1862), and the editor's note to that case (p. 288) were referred to.

[THE LORD CHIEF JUSTICE: Is there not a point in the case which arises before you get to that question? Suppose the appellant, while violating the girl, merely put his hand over her mouth to prevent her screaming, and suppose that by accident he put his thumb on the larynx and she was suffocated. Was it not open to the jury to find that the appellant could not reasonably be said to have contemplated the death of the girl? If so, the question ought to have been left to the jury whether as a fact the appellant put his thumb on the larynx to strangle her, or whether he merely put his hand on her mouth to prevent her crying out, and his thumb accidentally pressed on the larynx.]

1919
17 *November.*

ARTHUR BEARD.

Reading L.C.J. Coleridge J. Sankey J.

The pressure of the thumb on the windpipe was accidental in the act of placing the hand on the girl's mouth to prevent her screaming. The question ought to have been left to the jury whether as a fact appellant put his thumb there deliberately to strangle her, or whether he merely put his hand over her mouth to prevent her screaming, and whether the pressure of the thumb on the windpipe was accidental. The jury should have been told that it was open to them to return a verdict of manslaughter. It was a purely accidental act, and was not necessarily homicidal in its character. The question was whether, as a reasonable man, he ought to have contemplated that death would result. *Fletcher*, 2 Car. & Kir. 215 (1845), and *Lad*, Leach, 96 (1773).

In order to justify a conviction of murder, the act must be of a homicidal character, or of so obviously grave a character that it must have occurred to the man that death might result. *Serné*, 16 Cox C. C. 311 (1887). It was essentially a matter for the jury to decide on the evidence, and on the evidence before them they could only arrive at the conclusion that the placing of the thumb on the windpipe was accidental. But the learned judge directed them that they must, as a matter of law, return a verdict of guilty of murder. He never left this question, which was essentially one of fact, to the jury at all. *William Hopper*, 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. Rep. 381; 79 J. P. 335; 31 T. L. R. 360; 11 Cr. App. R. 136; *Whitmarsh*, 62 J. P. 711 (1898, illegal operation); *Bottomley*, 115 L. T. Newsp. 88 (1903, illegal operation); and *Lumley*, 76 J. P. 208; 22 Cox C. C. 635 (1911, illegal operation), were referred to. The direction on the first point was wrong and the verdict ought not to stand.

With regard to the second point, the evidence for the defence with regard to the issue of drunkenness was never put to the jury. Appellant had had terrible experiences in the war. He had been drinking heavily on the day of the murder. He had drunk a lot of beer and some whisky. The law was laid down in *Meade*, 1909, 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 2 Cr. App. R. 54, and according to the law as there laid down the learned judge misdirected the jury on this point also, inasmuch as he gave a direction which was only applicable to the issue of insanity.

Sir Ellis Griffith, K.C. (and *R. Sutton*) for the Crown. There

1919
17 *November.*

ARTHUR BEARD.

Reading
L.C.J.
Coleridge J.
Sankey J.

was overwhelming evidence that appellant was not in any state of intoxication at the material time. The learned judge's direction was right. There was no evidence that the man was suffering from the effects of drink to such an extent that the question of drunkenness can arise at all. Moreover, there was evidence that he had attended a meeting of a trade union on the same evening shortly after committing the crime.

On the question of constructive murder the direction of the learned judge was right. It would have been a misdirection for the judge to direct the jury on the facts of this case that it was open to them to return a verdict of guilty of manslaughter. There was no suggestion of accident in the case. The only person who could displace the presumption that the girl died in the course of the struggle and in consequence of the violence used by the prisoner, was the prisoner himself, and in his statements there was no suggestion of an accident, so that the question of accident was never before the Court at all. The abortion cases which have been referred to do not apply. There was no violence in those cases. In this case it was in the course of the act of overpowering the girl that the death occurred. So far as the outrage on the girl was concerned appellant's act was intentional, and the death was the natural consequence of the violence used by appellant, and he must be presumed to have intended the natural consequence of his action. It was not an accident, it was a deliberate act within the dictum of Bramwell B., in *Horsey*, 3 F. & F. 287, 288 (1862, death through arson). It is quite wrong to use the word "accident" here.

[LORD COLERIDGE J.: Suppose the act done was not calculated to cause death but did cause death; for example, suppose the girl had false teeth and the prisoner put his hand gently on her mouth and she swallowed her false teeth and choked and died, would that have been murder?]

Yes, he was engaged in a felony of violence.

C. a. v.

24 *November.*

The LORD CHIEF JUSTICE read the following judgment. The appellant appeals against his conviction of the wilful murder by him of Ivy Wood, a girl of thirteen years of age, and he asks

1919
24 *November.*

ARTHUR BEARD.

Reading L.C.J.

this Court to substitute a verdict of manslaughter for that of murder recorded against him. The appellant on July 25th was, and for some weeks had been employed at Carrfield Mill as a night watchman, and it was his duty to attend from six in the evening to six in the morning. About 6 o'clock in the evening on July 25th, Ivy Wood was sent by her father on an errand to get some small articles from a shop. About 6.30 she was seen entering the gate that leads into the mill, and was never again seen alive by any person who gave evidence at the trial.

The case made against the appellant is that he attacked the child for the purpose of violating her, that the child resisted, that there was a violent struggle or a succession of struggles by the child to free herself from him, that he did violate her, and that in the course of the struggle by her he placed his hand over her mouth with his thumb on the throat just over the larynx, and the mark found on her throat shewed that he had exercised considerable pressure upon it. The appellant made statements which related his account of the events of that evening, and which shewed that he was the person who had attacked and violated the child. The medical evidence established that the death of the child was caused by suffocation and violation.

The only defence put forward at the trial was that the crime was committed when the appellant was in so drunken a condition that the jury should find a verdict of manslaughter and not one of murder.

During a discussion on the law applicable to the case the learned judge said that he should tell the jury that if a man is engaged in violating the honour of a woman and she does her best to defend herself and struggles, and the man does something which kills her, to prevent her from screaming or struggling, it is murder. In summing up he directed them that "if a man is assaulting a woman or girl, and the woman or girl, in order to resist him screams and struggles, and the man, in order to effect his purpose, puts his hand upon her mouth and suffocates her, he is guilty of murder, and it is no use at all to say, 'I only intended to stop her screaming, I did not intend to kill her.' That is no defence, in my judgment." And then with regard to the defence of drunkenness, he told the jury that if the appellant "has satisfied you by evidence that he was so absolutely drunk at the time that he did not know what he was doing, or did not know that he

was doing wrong, then the defence of drunkenness succeeds to this extent, that it reduces the crime from murder to manslaughter." The appeal to this Court is based upon the objection to the summing-up, that the learned judge should have directed the jury (a) that if they thought that the violent act which was the immediate cause of death was not intentional on the part of the appellant, but was an accidental consequence of his placing his hand over the child's mouth to stop her screams, they should, or could, return a verdict of manslaughter; and (b) that the direction upon the drunkenness was not in accordance with the law, but was the test applicable to a case where there was a defence of insanity, and that consequently the jury, when considering their verdict, applied a direction of the law which was wrong, and was unfavourable to the defence.

With regard to the first objection, we are of opinion that the learned judge was right in directing the jury that upon the facts and circumstances of this case (and apart from the defence resting upon the drunkenness of the appellant) they should return a verdict of murder. Upon the evidence it was established beyond doubt that the appellant killed the child by an act of violence done in the course, or in furtherance, of the crime of rape; and that constitutes the crime of murder and not of manslaughter. The argument before this Court on behalf of the appellant of the absence of intention to inflict serious injury upon the child was not put to the jury at the trial save in relation to the defence of drunkenness. The learned judge's summing up must be considered with regard to the facts and the circumstances of the defence before him; he was not delivering an exhaustive explanation to the jury of the law relating to homicide, but he was directing them upon the case before them, and he correctly stated the law applicable to it in that respect.

It was suggested that notwithstanding that the defence had not argued the point before the jury at the trial, the judge should have dealt with it in his summing up, and reliance in support of this argument was placed upon *Hopper*, 11 Cr. App. R. 136 (1915). There is no substance in this contention inasmuch as the evidence did not support it, but was wholly inconsistent with it. Once the facts of this case are properly understood the law is beyond controversy, and the problems discussed during the argument before this Court have no bearing upon this case.

1919
24 *November.*

ARTHUR BEARD.

Reading L.C.J.

It was proved that there was a struggle of a horrible description between this man, seeking to consummate his desire, and this 13 years old girl. No questions were put in cross-examination by Mr. Artemus Jones for the defence, to minimise the effect of the testimony about the struggle that must have taken place. The child was straining every nerve and muscle to escape him, and in order to overpower her and to stop her struggles and screams he eventually did the act which resulted in her death. By the law of England that is murder: it is an act of violence done in the course or in furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder.

With regard to the second objection, the learned judge stated that if this man had not been drunk or under the influence of much strong drink (he had drunk quantities of beer and also of whisky) the appellant would never have done what he did. There was abundant evidence that the appellant had been drinking heavily and continuously. There was also evidence that he attended a meeting of a trade union after the crime had been committed, and had given not unintelligent answers to questions, and further that he had done a series of acts to conceal the crime. The law relating to drunkenness as an excuse for the crime, so as to reduce the crime of murder to manslaughter, was considered in this Court in *Meade*, 1909, 1 K. B. 895, and the decision then given has been followed in numerous directions at the trial by judges and in judgments by this Court. It distinguished between the law relating to insanity and that applicable to drunkenness. It established that the presumption that a man is taken to intend the natural consequences of his act may be rebutted in the case of a man who is drunk by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous—*i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended the natural consequences of his act is rebutted.

In the present case, the learned judge told the jury that they must find either that the appellant did not know what he was doing, or did not know that he was doing wrong, and gave as an instance the case of a man who cut the throat of a woman thinking he was cutting the throat of a pig. This imposes a test of the mind of the appellant less favourable to him than that of

1919
24 *November.*

ARTHUR BEARD.

Reading L.C.J.

Meade, and is a direction which the Court in that case thought was calculated to mislead the jury. The appellant was entitled to have the law stated to the jury as laid down in *Meade*. Upon the direction of the judge it was impossible upon the evidence to reduce the crime to manslaughter. Had the direction of *Meade* been given it is impossible for the Court to say what the verdict would have been. We have therefore come to the conclusion that the verdict must be reduced to that of manslaughter. The crime is of the gravest description, and committed in circumstances which make it necessary for this Court to pronounce a sentence of the severest character. It is that of 20 years' penal servitude.

Conviction of murder quashed.

Conviction of manslaughter substituted.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE SANKEY.

1919
24 *November.*

WILLIE HAMMERSLEY.

Conviction as habitual criminal quashed in view of a period of honest work.

Appeal against conviction.

Appellant was convicted at Leicester City Sessions, before the Recorder, on October 13th, 1919, of housebreaking, and sentenced to three years' penal servitude. He was also convicted as a habitual criminal and sentenced to five years' preventive detention.

Appellant appealed against the conviction of being a habitual criminal on the ground that it had not been proved that he was leading persistently a dishonest or criminal life.

Appellant in person.

S. E. Pocock for the Crown. There was evidence that appellant had been convicted at least fourteen times of housebreaking and other crimes between 1877 and 1910. Between 1912 and 1917, he had been at work with various employers and did not during that period lead a criminal life. In 1917 he was convicted for attempted shopbreaking and sentenced to imprisonment for twenty-one months with hard labour. From the time of his release from prison in February, 1919, until he committed the present primary offence of housebreaking in September, 1919, he drew unemployment pay under the Government scheme. This he supplemented by working at home doing a small amount of boot making.

[THE LORD CHIEF JUSTICE: To support the conviction as a habitual criminal it must be shewn clearly that between February and September, 1919, the appellant was leading persistently a dishonest or criminal life.]

There was the additional evidence that he had been constantly

1919
24 *November.*

WILLIE HAMMERSLEY.

Reading L.C.J. Darling J. Sankey J.

associating during the latter period with the man with whom he was convicted in 1917. Moreover, when apprehended in the act of committing this present offence he was found with housebreaking implements upon him, pointing to premeditation and so persistency in crime; this also showed that he had returned to and adopted the methods of the "professional" criminal. Finally, the three statutory convictions were duly proved as required by the Prevention of Crime Act, 1908. Counsel referred to *Baggott*, 4 Cr. App. R. 67, 1910; and *Martin*, 5 Cr. App. R. 31, 1910.

The LORD CHIEF JUSTICE: The appellant has led a life in which crime predominated since 1881. But notwithstanding his bad record before 1911, it appears that between the time of his release from prison in 1912 and 1917 he did not lead a criminal life, and had been at work with various employers. In 1917 he committed an offence for which he was sentenced to imprisonment for twenty-one months with hard labour. In February, 1919, he came out of prison after serving that sentence, and thereafter he worked, fitfully it is true, in boot repairing, and he drew unemployment pay under the Government scheme, taking care not to work so as to make it impossible for him to receive that unemployment pay. He continued in that way until he committed the substantive offence in this case, which, no doubt, is a bad one. It must be borne in mind, as has often been pointed out in this Court, that a prisoner about to be charged as a habitual criminal is a person who has just been convicted before the jury of an offence meriting a sentence of at least three years' penal servitude, and it is therefore necessary that the jury should be satisfied that the prisoner was leading persistently a dishonest or criminal life. In this case, in addition to evidence of the previous convictions, it was proved that the appellant had been associating with the man with whom he was convicted in 1917. But evidence of that fact, having regard to the other circumstances, was not, in the opinion of this Court, sufficient to establish that the appellant was leading persistently a dishonest or criminal life. Sufficient attention was not paid to that question at the trial. For these reasons the conviction of being a habitual criminal cannot stand, but the primary sentence remains.

Conviction as habitual criminal quashed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE SALTER.

1919
1 *December.*

ALFRED BOLAM.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on November 14th, at Derby Assizes, before Mr. Justice Greer, of larceny, and was sentenced to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

SALTER J.: The appellant's record is a bad one. Since 1907 he has had fifteen convictions against him, including convictions of housebreaking and other serious offences. But it is to be observed that since June, 1917, he has kept out of trouble. In May, 1917, he received a sentence of one month's imprisonment for common assault. Since that time he has kept out of trouble until the present offence, which was a petty theft. His record is a bad one, but we have certain information before us which was not before the learned judge who sentenced the appellant. It is always material to see how recent the previous convictions are, and although we cannot ignore his bad record, yet we think, in the circumstances, that the sentence of three years' penal servitude is excessive. The order we make is that it be reduced to nine months' imprisonment with hard labour, and, as leave to appeal was given, the sentence will date from conviction.

Sentence reduced.

T. W. M.

CHARLES WAKELEY.

1919
1 *December.*

Reading
L.C.J.
Sankey J.
Salter J.

An information preferred within a time limited by statute may be amended after the expiry of that period provided that the date substituted is within the period.

The Court does not necessarily give effect to the view of the judge at the trial that there should have been an acquittal (owing to the absence of corroboration of the prosecutrix's evidence in a sexual case).

Appeal against conviction.

Appellant was convicted on October 31st, 1919, at the Devonshire Assizes, at Exeter, before Mr. Justice Darling, of having carnal knowledge of a girl between thirteen and sixteen years of age, and was sentenced to twelve months' imprisonment with hard labour.

H. Geen for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The prosecution in this case was commenced more than six months after the commission of the alleged offence. By s. 5 of the Criminal Law Amendment Act, 1885, as amended by s. 27 of the Prevention of Cruelty to Children Act, 1904, the proceedings must be taken within six months after the commission of the alleged offence. In this case an information was preferred against appellant on May 3rd, 1919, alleging the commission by him of the offence on or about Nov. 6th or 7th, 1918. Appellant had a complete answer to that information by proving that he was out of the neighbourhood on both dates, and could not therefore have committed the alleged offence on the dates mentioned in the information. But the authorities on May 13th amended the information by substituting between November 3rd and 8th, 1918, for the dates in the original information. The evidence of the girl was that appellant had intercourse with her on November 4th. Therefore, the information as amended on May 13th, 1919, which was the commencement of the prosecution, was ten days too late. No information or substituted or amended information after May 3rd, 1919, should be allowed to take away appellant's rights under the statutory limitation of time. See *Weldon* v. *Neal*, 19 Q. B. D. 394: 1887.

The learned judge, in summing up, told the jury that there was no corroboration of the girl's story, and warned them against

1919
1 *December.*

CHARLES WAKELEY.

Reading L.C.J.
Sankey J.
Salter J.

convicting appellant on evidence of that kind without corroboration. The jury, nevertheless, convicted the appellant. *G. Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox C. C. 524; 12 Cr. App. R. 81, was referred to.

W. T. Lawrance for the Crown was not called on to argue.

The LORD CHIEF JUSTICE: This appeal is based on the ground that the prosecution was begun more than six months after the commission of the offence on November 4th, 1918. When the prosecution was started on May 3rd, 1919, the information charged appellant with having committed the offence between November 6th and 7th, 1918. Subsequently, on May 13th, 1919, the information was amended and the offence was alleged to have been committed between November 3rd and 8th. If the original information had alleged that the offence had been committed between November 3rd and 8th, no objection could have been raised that the prosecution was not commenced within six months of the commission of the offence.

But it was said by counsel that we must regard this prosecution as having been started not earlier than May 13th, 1919, the date when the information was amended, which was beyond six months after November 4th, the date of the commission of the offence. We are of opinion that the point fails. There is no substance in it, as the date on which the offence was committed was within six months before the date of the original information. If the amendment had resulted in charging the commission of the offence on a date outside the period of six months, there would have been great force in the argument. But that is not this case. The information as amended does not charge a different offence, and the amended information cannot be said to have been the institution of the proceedings. It was a step taken during the proceedings. The case cited of *Weldon* v. *Neal* does not apply, and the point fails.

Our attention has been drawn to the summing up of the learned judge, who was of opinion that appellant ought to be acquitted because the girl's story was not corroborated. But the jury, after hearing the direction of the learned judge, found appellant guilty. *Baskerville* has been referred to, but in this case the Court cannot

say that the verdict of the jury was so unreasonable that it cannot stand. Therefore, the appeal must be dismissed.

1919
1 *December.*

CHARLES WAKELEY.

Reading L.C.J.

Appeal dismissed.

T. W. M.

LEWIS SAYE.

8 *December.*

Sentence mitigated in view of meritorious military service.

Appeal against sentence.

Appellant was convicted on November 18th, at the Central Criminal Court, before the Recorder, of shop-breaking, and was sentenced to three years' penal servitude.

Appellant was not present, and no counsel appeared on either side.

The LORD CHIEF JUSTICE: No question arises with regard to the facts in this case. The appellant is forty years of age. He has had ten previous convictions, and on two occasions has been sentenced to penal servitude. He was released from prison nearly two years before the commission of the offence which is the subject of the present charge. He went into the Army and was demobilized last February. His record during that period was good. At the same time the Court cannot leave out of consideration his past offences. But bearing in mind that for two years he has conducted himself properly we are of opinion that the sentence is too severe, and therefore it will be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

1919
15 *December.*

ARTHUR WHEATLEY.

Applications for leave to appeal.

Sentence not allowed to run from date of conviction, though leave to appeal had been given, on the ground of material facts having been withheld from the Court on the application for leave.

Appeal against conviction.

Appellant was convicted at the County of London Sessions, before the Chairman, on November 6th, 1919, of breaking into a garage and stealing a motor cycle and sidecar, and was sentenced to twelve months' imprisonment with hard labour.

F. Van den Berg for the appellant, who was present. Leave to appeal was granted by the full Court on December 8th. Since the trial, evidence has become available which establishes that appellant and a number of others were in the house of a certain person at the time he was alleged to have committed the offence. There were seven persons present at the party, and all of them say that the party did not break up until after 1 o'clock on the morning. The alleged robbery took place about 11 o'clock on the night in question.

The Court allowed the evidence to be called, and various witnesses were called to establish the *alibi*. It appeared that some of the witnesses were near relatives of appellant.

Vesey-FitzGerald for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The Court cannot accept the evidence which has been given, and the appeal must be dismissed. With regard to the sentence, while it is the practice when leave

1919
15 *December.*

ARTHUR WHEATLEY.

Reading L.C.J.

to appeal has been given, and the appeal is afterwards dismissed, to allow the sentence to run from the date of the conviction, that course will not be followed in the present case because a full disclosure was not made when leave to appeal was asked for, of the material fact that certain of the witnesses whom it was intended to call to establish the *alibi* were near relatives of the appellant.

Appeal dismissed.

Solicitor for Appellant—*H. C. L. Hanne.*

T. W. M.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

1919
18 *December.*

ARTHUR E. MASON.

The Court leans to allowing sentences of imprisonment in the second division *to run from the date of conviction.*
Respondents are not entitled to be heard on applications for such relief.

Appeal against conviction on a point of law.

Appellant was convicted on the 15th November, 1919, at the Stafford Assizes, before Mr. Justice Rowlatt, of perjury, and was sentenced to six months' imprisonment in the second division.

Disturnal, K.C., *Arthur Ward*, and *Ridsdale* for the appellant, who was not present.

J. B. Matthews, K.C., *Sir R. Muir*, and *Kenelm Preedy* for the respondents.

The Court dismissed the appeal.

Disturnal: I ask that the sentence in this case should run from the date of conviction, notwithstanding that no leave to appeal was given. Appellant has not been on bail since conviction.

J. B. Matthews: We desire to say that we do not resist the application.

A. T. LAWRENCE J.: I am not sure that you can be heard on the matter.

AVORY J.: You certainly could not be heard against it.

A. T. LAWRENCE J.: As the sentence is one of imprisonment in the second division, the Court thinks it may count in this case from the date of conviction.

1919
18 *December.*

ARTHUR E. MASON.

LAWRENCE J.

Appeal dismissed.

Solicitors for Appellant—*Higgs & Son*, Brierly Hill, Worcestershire.

Solicitor for Respondents—*The Solicitor of Inland Revenue.*

T. W. M.

JOHN BURKE.

19 *December.*

Bigamy—Severity of sentence.

Appeal against sentence.

Appellant was convicted on the 26th November, 1919, at Manchester Assizes, before Mr. Justice McCardie, of bigamy, and was sentenced to ten months' imprisonment in the second division.

Appellant was not present and no counsel appeared.

A. T. LAWRENCE J.: We have considered this case, and on the whole we think the sentence is too severe. Appellant went through the form of marriage with a woman who had been a widow for 14 years. She became aware that appellant's wife was still alive, and notwithstanding that she continued to live with Burke for over two years. It is not clear that she was ever deceived by appellant. We think that the sentence should be reduced to one of three months' imprisonment in the second division.

Sentence reduced.

T. W. M.

BEFORE

MR. JUSTICE COLERIDGE, MR. JUSTICE ROWLATT, AND MR. JUSTICE McCARDIE.

1919
19 *December.*

GEORGE SMELLIE.

For good reason a judge may order the removal of a defendant out of the sight though not out of the hearing of a witness giving evidence.

This was an appeal against sentence and an application for leave to appeal against conviction.

Appellant was convicted before the Chairman at the Middlesex Sessions, on the 24th of November, 1919, of assaulting, illtreating, and neglecting his daughter Frances, aged about eleven, in a manner likely to cause her unnecessary suffering or injury to her health, and was sentenced to twelve months' imprisonment in the second division.

Only one point calls for mention. Before appellant's daughter Frances was called to give her evidence, appellant was compelled by the warder, by order of the Court, to sit upon the stairs leading out of the dock, out of sight of Frances, while she gave her evidence.

Leonard May for the appellant, who was present. The act of the learned Chairman in removing appellant from the dock during the hearing of the evidence of Frances invalidates the whole trial. First, because a prisoner is entitled at common law to be within sight and hearing of all the witnesses throughout his trial; and secondly, because on a charge of this kind the effect on the minds of the jury of the removal of the prisoner from the dock by order of the Chairman at the moment when his daughter is entering the witness box is incalculable; and thirdly, that in this particular case the effect of his removal on the evidence of the little girl would also be incalculable, because it was admitted that he

1919
19 *December.*

GEORGE SMELLIE.

Coleridge J
Rowlatt J.
McCardie J.

had beaten her for stealing, and she might be inclined to say untrue things in his absence which she would not have said under the restraining influence of his presence.

On the first point there is no statutory justification for the course adopted by the learned Chairman. It is quite clear that in cases of felony the prisoner must stand in the dock to be tried (see *St. George*, 9 C. & P. 483: 1840), and there have been cases in ancient times at assizes where the prisoner behaved so badly that he had to be tied to the dock with chains and straps (see Stephen's *Digest of Criminal Procedure*, Art. 302). Even in cases of misdemeanour like the present, there is no reported authority for the removal of the prisoner from the dock except one case, where the prisoner was removed and tried and sentenced in her absence, after two previous attempts to try her had all ended in her creating such an uproar in the dock that it was impossible for the trial to proceed in her presence (see *Mary Browne*, 70 J. P. 472, 1906, at C. C. C., before the Recorder). Here there is no suggestion that the prisoner did not behave with perfect decorum in the dock, but he was removed because the learned Chairman came to the conclusion that his presence would terrify his child. I submit the statement in some books that a charge of misdemeanour may be tried in the absence of the accused if he has previously pleaded is too wide, and that the authority of *Browne*, above, given in support of it, does not support that statement. Moreover, *Lovett*, 9 C. & P. 462, 1839, sometimes cited in support of the proposition that it is not necessary for the prisoner to be in the dock, is simply one where the prisoner for convenience was allowed to sit at the solicitors' table. Park J. and Garrow B. certainly expressed the view that a case could not go on in the absence of the prisoner without his consent, and doubted whether the consent of his counsel, would be sufficient. *Streek*, 2 C. & P. 413, 1826: misdemeanour; prisoner fainted and trial adjourned. There is plenty of authority that where a prisoner alleges that he cannot hear he is permitted to be brought within the bar to enable him to hear the witnesses: *Huggins*, 17 St. Tr. 311, 1729: murder. Here the prisoner was removed by order of the Chairman to sit on the stairs going out of the dock while his little girl stood near counsel for the prosecution to give her evidence.

Valetta for the prosecution.

1919
19 *December.*
GEORGE SMELLIE.
Coleridge J.

LORD COLERIDGE J.: If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

Appeal, &c., dismissed.

Solicitor for Appellant—*Hall Tompkins.*

L. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

LAZARUS MORRIS SHAFFNER.

1920
12 & 13 *Jan.*

A deposition made before the committing magistrate may be read against a witness who at the trial repudiates his evidence in the court below.

In making a recommendation for expulsion part of a sentence regard must be had to the period of the alien's residence in this country.

Appeal against conviction and sentence.

Appellant, who was present, was convicted at Leeds Assizes, on December 6th, 1919, before Mr. Justice Coleridge, of receiving stolen property, and was sentenced to 14 months' imprisonment with hard labour, and recommended for expulsion.

Sir E. Marshall Hall, K.C. (with him *Coleman Phillipson*) for the appellant, who was present. Appellant was convicted of receiving stolen goods. A man named Young, who does not appeal, was convicted of burglary and stealing the goods. Young gave evidence at the hearing before the magistrate, and his evidence was taken down in writing in the usual way, read over to him, and signed by him. At the trial at the assizes, Young repudiated the evidence given by him before the magistrate, but his depositions were read. It is submitted that the depositions were not admissible. Evidence sworn at a previous hearing before the magistrate, and withdrawn, was not admissible, and ought not to have been put to the jury. In summing up, the learned judge failed to differentiate between evidence that was relevant and admissible against Young, and evidence which was relevant and admissible against appellant.

1920
12 & 13 *Jan.*

LAZARUS MORRIS SHAFFNER.

Reading L.C.J. Avory J. Sankey J.

Paley Scott for the Crown. The depositions of Young were properly admitted. The questions were properly put to Young about what he had said in the Court below and the depositions were in, and the evidence was admissible. There was no misdirection.

[He was stopped.]

The LORD CHIEF JUSTICE, after referring to the facts, said: Counsel has addressed a careful and forcible argument on behalf of the appellant, and has contended that the depositions of Young were not evidence against appellant, and that the learned judge ought to have directed the jury to disregard the evidence of Young. This contention cannot prevail. The conviction did not rest on Young's evidence. Young proved himself utterly unworthy of any credence once he had been cross-examined, but it cannot be said that the judge ought to have directed the jury to disregard his evidence. The jury were entitled to consider that Young had already sworn a statement which supported other evidence given against appellant. We have come to the conclusion that there was no misdirection, that there is no ground for interfering with the verdict, and that the appeal against the conviction fails.

With regard to the sentence, and the recommendation for deportation, it is to be observed that the appellant has lived for 40 years in this country. He is a Russian Pole, and in view of the condition of affairs in Russia at the present time, and following *Sidney Friedman*, 10 Cr. App. 72: 1914, we have come to the conclusion that no use ought to be made of the power to expel the appellant. Subject to that, the sentence of imprisonment must stand, and as leave was given it will run from the date of the conviction.

Sentence of expulsion set aside.

Solicitors for Appellant—*Ward, Bowie & Co.*, agents for *J. Wurzal*, Leeds.

T. W. M.

JOSEPH HARPER.

1920
13 *January.*

Reading
L.C.J.
Avory J.
Sankey J.

Bigamy—Severity of sentence.

Appeal against sentence by leave of full Court.

Appellant was convicted at Manchester Assizes, before Mr. Justice McCardie, on November 25th, 1919, of bigamy, and sentenced to 18 months' imprisonment with hard labour.

Appellant was not present, and no counsel appeared.

The Lord Chief Justice: This is an appeal against sentence. The appellant was married in 1909. He subsequently went through the form of marriage with another young girl, suppressing the fact that he was already married, and that his wife was still living. Although the offence is a serious one, yet, taking into account all the circumstances which it is unnecessary to particularise, a sentence of 9 months' imprisonment with hard labour is sufficient to meet the case, and we reduce the sentence accordingly.

Sentence reduced.

T. W. M.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

1920
2 *February.*

JOHN DUDLEY CARRUTHERS.

Application for leave to appeal against sentence.

Applicant was convicted at the Grimsby Borough Sessions, before the Recorder, on January 13th, 1920, of obtaining money by false pretences, and was sentenced to three years' penal servitude.

Applicant was not present, and no counsel appeared on either side.

AVORY J.: This is an exceptional case. Applicant was convicted some years ago of offences of dishonesty. In January, 1909, he was convicted of larceny and sentenced to three years' penal servitude. After serving that sentence, he, in 1915, joined the army, and became a quartermaster-sergeant, and as such was in charge of some tugboats, doing arduous and dangerous duties during the war. As a reward for his services he was awarded the Order of the British Empire. After leaving the army he obtained other employment, and for some years he had done honest and good work in the service of the country, until some union, of which he was not a member, interfered, and by their threats or representations to his employers, caused them to discharge him from their employment, with the result that he fell back into crime. The Court thinks that this is a case where leave to appeal from the sentence should be given.

Leave to appeal granted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE AVORY.

ALFRED WILLIAMS AND ALBERT WOODLEY.

1920
9 *February.*

Proviso to s. 4 of the Criminal Appeal Act, applied according to the rule in Cohen and Bateman, 2 Cr. App. R. 197, 1909.

Appeals against convictions.

Appellants were convicted at the Gloucester City Sessions, before the Recorder, on January 10th, 1920, of shop and warehouse-breaking, and conspiracy to break and enter a shop and warehouse, and Williams was sentenced to eighteen months' imprisonment with hard labour for the shop and warehouse-breaking, and to three months' imprisonment with hard labour (concurrent) for the conspiracy. Woodley was sentenced to three years' penal servitude for the shop and warehouse-breaking, and to three months' imprisonment with hard labour (concurrent) for the conspiracy.

Sir Norris Foster for the appellants, who were present. Appellants and two other men were tried together. The principal point is that there was an irregularity in the course of the trial which was not discovered until after its conclusion. At the end of the trial, and as the jury were about to retire, an abstract of the indictment was handed to them. It was afterwards discovered that there were at the foot of the abstract some notes to the effect that there were previous convictions against both appellants; against Woodley of horse stealing, and against Williams of housebreaking. That was a serious irregularity, and the convictions ought not to stand.

[THE LORD CHIEF JUSTICE: There has been an irregularity.

1920
9 *February.*

ALFRED WILLIAMS AND ALBERT WOODLEY.

Reading
L.C J.
Lawrence J.
Avory J.

The question now arises whether we can act under the proviso to s. 4 of the Criminal Appeal Act, and whether, notwithstanding the irregularity, no substantial miscarriage of justice occurred.]

It is submitted that the Court ought not to act under that proviso.

Lort-Williams for the Crown. The irregularity is admitted, but no substantial miscarriage of justice occurred. The evidence against both appellants was so strong that the jury were bound to convict appellants even if the irregularity had not occurred. In view of the strong evidence against appellants the Court is justified in applying the proviso and dismissing the appeal.

The LORD CHIEF JUSTICE: The appellants were convicted on counts of an indictment which charged them, together with two other prisoners, with conspiracy to break and enter a shop and a warehouse, and to steal and to receive a motor bicycle. The appellants and the third man were found guilty, but the fourth prisoner was acquitted, but he was charged in the same indictment with receiving the motor bicycle and was convicted. The appellants were also charged with conspiring to break and enter a warehouse at Gloucester, and steal and receive cases of whisky and brandy, and with breaking and entering and receiving the whisky and brandy. They were also charged with breaking and entering a bicycle shop and stealing and receiving a motor bicycle. They were convicted of all these offences.

The two appellants now appeal on one ground. There was another ground, namely, the refusal of the Recorder to order separate trials of the appellants and two other prisoners who were indicted with them, but that ground has been abandoned. In truth the learned Recorder was most careful in summing up to differentiate between the prisoners. The real point in the appeals is that the learned Recorder, in the course of his summing up, indicated to the jury that he would hand to them, as he did subsequently, the abstract of the indictment. Unfortunately it was not noticed that there were notes of previous convictions against the appellants at the foot of the abstract. It was obviously a slip. If the notes had been noticed, the learned Recorder never would have handed the abstract to the jury.

1920
9 *February.*
ALFRED WILLIAMS AND ALBERT WOODLEY.
Reading L.C.J.

But the result is that the jury had before them information about the previous convictions of the appellants. That is information which never ought to have been in the possession of the jury. The placing of that information in their possession is an irregularity, and a serious irregularity, and therefore the appellants, if the case rested there, would have been entitled to succeed here. But the matter does not rest there, because to prevent injustice being done to persons charged with crime the legislature, in passing the Criminal Appeal Act, had in mind irregularities and slips of this kind, and some misstatement or some misdirection of law which might be given at the trial, and in its anxiety to ensure that justice in its widest sense should be done, it passed a proviso to s. 4 of the Act of 1907, which gave this Court power, notwithstanding that there was an irregularity, to dismiss the appeal if this Court considers that no substantial miscarriage of justice has actually occurred. The proviso is in terms applicable to any and every case, but whether it should be applied must depend on the merits of each particular case.

The meaning to be attributed to these words, "no substantial miscarriage of justice has actually occurred," was dealt with by Channell J. in *Cohen and Bateman*, 2 Cr. App. R. 197, 1909, at p. 208, where he says: "If, however, the Court in such a case comes to the conclusion that on the whole of the facts, and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge not being a wrong decision of a point of law." The importance of that is that it shows that what the Court has to consider is whether, notwithstanding the irregularity, the only reasonable and proper verdict would be one of guilty, and if that is so, there is no miscarriage of justice.

It is sufficient to say that here is a case of a serious irregularity, and that applying the proviso of s. 4 of the Act of 1907, we have come to the conclusion on the facts of this case, and having regard to the evidence given at the trial, that without this irregularity, and assuming that there were no notes of the previous convictions of the appellants on the abstract supplied to the jury, they must inevitably have arrived at the same verdict of guilty against the appellants.

1920
9 *February.*

ALFRED WILLIAMS AND ALBERT WOODLEY.

Reading L.C.J.

It is unnecessary to travel in detail through all the facts of the case, but it is established that the appellants were found in possession of goods which had been stolen. They were also found in possession of house-breaking implements, and they were unable to give any explanation of their possession of the stolen goods. Without going into any other facts, it is sufficient to say that on the evidence, bearing in mind the fact that they were unable to explain how they obtained possession of the stolen goods, we must come to the conclusion that the jury would inevitably have held, without the information about the previous convictions, that the prisoners were guilty, and that the irregularity did not affect the verdict, and therefore, notwithstanding the irregularity, the appeals must be dismissed

Appeals dismissed.

Solicitors for the Appellants—*Wellington and Clifford,* Gloucester.

T. W. M.

JOHN DUDLEY CARRUTHERS (*a*).

Sentence mitigated in view of meritorious military service.

Appellant was not present, nor represented by counsel.

Sandlands for the Crown.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to obtaining the sum of 40*l.* by means of false pretences, and was sentenced to three years' penal servitude. He now appeals against the sentence.

In his early days this man had been convicted of crime on various occasions. In January, 1909, he was sentenced to three years' penal servitude for larceny. In the ordinary course he would have been released about April or May, 1911, and from that time until the offence to which he has now pleaded guilty, he had not been convicted of any other offence.

He enlisted into the army early in 1915, and was promoted to

(*a*) See p. 134, above.

1920
9 *February*.

JOHN DUDLEY CARRUTHERS.

Reading L.C.J.

the rank of Quartermaster-sergeant, and was placed in charge of a considerable number of tugboats. He displayed undoubted gallantry during that time, for in June of that year he was decorated for courage in the performance of arduous and dangerous duties. When we think of the events of those days, and of this man being engaged on tugboats, navigating the ocean during the submarine and other dangers, we realise that when he was decorated for courage in the conduct of those operations he really must have been behaving extremely well.

In 1918 he appears to have committed some irregularities when in charge of tugboats. He had a considerable number of tugs under his charge, and he then obtained some small sums of money which undoubtedly were dealt with by him in a way that was improper.

In November, 1918, after the armistice, he left the army, and eventually obtained employment as master of a tug at the wages of £8 : 10*s*. 0*d*. per week. He seems to have conducted his work very well, and to have earned the approval of his employers. Unfortunately, however, a few months after he had obtained that employment, a representative of the Tugboatmen's Union brought pressure to bear on the employers to dismiss him because he was not a member of that Union. It was, apparently, an Union for those who had been apprenticed as boys. Appellant could not join it, and although he had gone through the dangers of the war, he was discharged. Through no fault of his own he found himself in the position that he had lost his employment as master of the tug.

Very soon afterwards, disgusted as he said with the position in which he found himself, he resorted again to crime. In addition to the offence with which he was charged he committed other offences of a similar character within a short time. These various offences the learned Recorder took into account when sentencing him, so as to give him a clean sheet when he came out of prison.

The case has given us considerable anxiety, as we cannot but feel that in all probability, but for his dismissal, this man would not now have been convicted of crime. The circumstances, no doubt, made it very difficult for him to obtain employment elsewhere.

We have also received a communication from a firm offering to take him into their employment at once if he is discharged.

1920
9 *February.*

JOHN DUDLEY CARRUTHERS.

Reading L.C.J.

The Court is naturally anxious if it can to release the appellant and to give him a chance of leading an honest life, but in the circumstances of this case, especially having regard to the offences committed by appellant in 1918 and 1919, of a similar character, we have come to the conclusion that it is impossible for us to deal with the case as we should have done if there had been only two or three offences charged against him. We cannot release this man at once to enable him to go into the employment which has been offered.

Nevertheless, we think the sentence in all the circumstances too severe, particularly having regard to the fact that since 1911 he has led an honest life and acquired a good reputation. The conclusion to which the Court has come is that the sentence must be reduced to nine months' imprisonment with hard labour. As leave to appeal was granted the sentence will run from the date of conviction. So far as it is in our power we shall try to obtain the promise of employment for him at the expiration of his sentence.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE SHEARMAN.

GEORGE STANLEY.

1920
23 *February.*

On a conviction as a habitual criminal, the Court is not bound to pass a sentence of preventive detention.
Appeal against (primary) sentence on the suggestion of the Court.
Severity of sentence mitigated in view of meritorious military service

Appeal against sentence.

Appellant was convicted at the County of London Sessions, before the Deputy-Chairman, on January 27th, 1920, of shop-breaking, and found to be a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

Appellant in person.

A. P. Poley for the Crown. The Director of Public Prosecutions desires to bring before the Court a possible alternative construction of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10, sub-s. (2), which is: "A person shall not be found to be a habitual criminal unless the jury finds on evidence (a) that since attaining the age of sixteen years he has, at least three times previously to the conviction of the crime charged in the said indictment, been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or (b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

[THE LORD CHIEF JUSTICE: So far there is no doubt once he

1920
23 *February.*

GEORGE STANLEY.

Reading
L.C.J.
Lawrence J.
Shearman J.

is convicted of the primary offence, that all that has to be proved on the charge of being a habitual criminal, is, under sub-s. (2) (b), that he has already on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.]

The question is, on the construction of the sub-s., whether the *onus* is on the prosecution to prove in the first case (a) that defendant has been convicted three times previously, and that he is leading persistently a dishonest or criminal life, which the prisoner can rebut by showing that he has not led such a life, and, secondly, in the alternative, that he has on a previous conviction been found to be a habitual criminal, and sentenced to preventive detention. A possible construction is that the prisoner can then call evidence to show that he does not come within the definition of a habitual criminal by reason of his not living persistently a dishonest or criminal life, as rebutting evidence. That point was not raised in *William Davis*, 1917, 2 K. B. 855; 87 L. J. K. B. 119; 117 L. T. 704; 34 T. L. R. 25; 62 S. J. 55; 13 Cr. App. R. 10. There the appeal was against a sentence as a habitual criminal. The defendant, who pleaded guilty to an indictment for housebreaking, was also charged with being a habitual criminal, the ground for so charging him being thus stated in the notice served upon him: "That on November 7th, 1911, you were at the Central Criminal Court convicted of a crime within the meaning of s. 10 of the Prevention of Crime Act, 1908." That conviction being proved, the jury found defendant guilty, the Chairman upholding the contention made for the prosecution that where a man who has once been convicted as a habitual criminal and is subsequently convicted of another crime, he can again be convicted as a habitual criminal on proof being given of the previous conviction as a habitual criminal, and without evidence being given that since the date of that conviction he has been leading persistently a dishonest or criminal life. It was argued for appellant that in the absence of evidence that a person is leading persistently a dishonest or criminal life he cannot be convicted as a habitual criminal under either clause (a) or (b) of s. 10, sub-s. (2).

[The LORD CHIEF JUSTICE: Does that case come to more than this, that on proof of a previous conviction as a habitual criminal

1920
23 *February.*

GEORGE STANLEY.

Reading L.C.J.
Lawrence J.
Shearman J.

it is not necessary to comply with the various conditions precedent mentioned in s. 10, sub-s. 2 (a)?]

That is my submission.

[The LORD CHIEF JUSTICE: Is there anything in *William Davis* which contradicts that?]

Mr. Justice Sankey says in his judgment there, "If the prosecution proceeds in this latter way the section does not say that the accused must be proved to have been leading persistently a dishonest or criminal life, and in our opinion it is sufficient to prove that he has been previously found to be a habitual criminal and been sentenced to preventive detention without also proving that he has been leading persistently a dishonest or criminal life. In some cases it may well be that this construction works hardship, because, since his previous conviction, the accused may have for a long time been leading a perfectly honest life; but that consideration is a matter for the Legislature and not for this Court. The appeal will be dismissed."

[The LORD CHIEF JUSTICE: Was any attempt made in *William Davis* to give evidence on the part of the accused that he had been living an honest life?]

No, there was not. That is the point. Counsel for the defence insisted on the fact that it was for the Crown affirmatively to make out that the man was persistently leading a dishonest life. Counsel for the prosecution rested his argument on the fact that all that was necessary for the prosecution to do was to prove that the man was a habitual criminal and had been convicted as such.

[The LORD CHIEF JUSTICE: The real point as I understand it must be that it does not follow that, because a man has been convicted of being a habitual criminal once, therefore the jury are bound to convict him on the production of the certificate, notwithstanding all the evidence that may be given that he has lived an honest life during the interval.]

That is the point.

1920
23 *February.*
GEORGE STANLEY.
Reading
L.C.J.
Lawrence J.
Shearman J.

[SHEARMAN J.: Does that mean that we are asked to reverse *Davis's* case?]

That is the difficulty.

[SHEARMAN J.: That is what *Davis's* case decided.

The LORD CHIEF JUSTICE: The only passage in *William Davis* which throws any light on it is: "In some cases it may well be that this construction works hardship."

SHEARMAN J.: It means that Mr. Justice Sankey saw that it may be a very harsh statute, and he says, if so, let the Legislature amend it. There is always a discretion for the Court, even when a man is convicted as a habitual criminal, to say I am not going to pass a sentence of either penal servitude or preventive detention. The Court need not pass a sentence of preventive detention unless it likes. If it thinks the man has been leading an honest life for a bit then nothing else applies.

The LORD CHIEF JUSTICE: I think that is the true construction. The law says he is convicted as a habitual criminal, but that amounts to nothing unless he gets the sentence, though he has already been convicted once.]

The LORD CHIEF JUSTICE (to appellant): Your appeal is against the sentence of five years' preventive detention; you have not appealed against the term of three years' penal servitude. Would you like to appeal against the sentence of three years' penal servitude?

Appellant: Yes.

Poley. Appellant's record in the army is before the Court. He was charged with shopbreaking. Nothing was actually stolen, but the evidence showed that he was watched one Sunday evening, and seen at a window by a little girl. There was also evidence that a door had been opened with a jemmy. He was in company with another man, and the two men having opened the door left and walked up and down the road.

1920
23 *February.*

GEORGE STANLEY.

Reading L.C.J.

The LORD CHIEF JUSTICE: The appellant was convicted of breaking and entering a shop with intent to steal, and he was also convicted under the Prevention of Crime Act, 1908, of being a habitual criminal. He was sentenced to three years' penal servitude for the offence of housebreaking, and to five years' preventive detention as a habitual criminal. He appeals to this Court against the sentence both of preventive detention and also of penal servitude. He does not appeal as regards the conviction.

Now, the first point to which attention is directed is the effect of s. 10, sub-s. 2 (b) of the Prevention of Crime Act, 1908. The Legislature, by that statute, gave power to the Court to pass sentence for a term of preventive detention, for a period from five years minimum to ten years maximum, in addition to penal servitude. By sub-s. 2 it is enacted that "a person shall not be found to be a habitual criminal unless the jury finds on evidence that he had been previously convicted three times before the conviction for the crime in respect of which he was then being tried, and—and this is important—that he was "leading persistently a dishonest or criminal life." The Court has had to deal with the meaning of those words, and the proper way of applying them in these cases, and there is nothing to be said upon them in this case. But under sub-s. 2 (b) there is an alternative, that is, "that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention." This Court has had to consider the meaning from one point of view of that sub-s. in the case of *William Davis*, and also in the case of *Collins*, which is referred to in *Davis's* case, but appears to be unreported, and came to the conclusion as shown by Mr. Justice Sankey's judgment delivered for the Court, that although it was possible that the construction then placed on the sub-s. by the Court might work hardship, nevertheless they were bound by what Parliament had done, and that if Parliament did not think that the Court was expressing the view intended by the Legislature, of course, that could be remedied by the Legislature. What the Court held in both those cases was, that when there had been a previous conviction of a person as a habitual criminal, then upon proof of that fact, that is that he had been convicted as a habitual criminal within the meaning of the statute of 1908, and that he had been sentenced to preventive detention, then the jury shall find him guilty. That is, we think, the true meaning of those decisions.

1920
23 *February.*

GEORGE STANLEY.

Reading L.C.J.

The Director of Public Prosecutions has given us the advantage of the argument put forward by counsel in this respect, and the Crown has properly brought the matter to our notice in a way in which the appellant could not have done being unrepresented by counsel. It does involve a matter of importance as affecting those persons who may be charged as habitual criminals. But the conclusion to which we have come is that Mr. Justice Sankey's view, not expressed, but indicated in *William Davis*, is the right view, and that once the previous conviction has been proved, and it has also been proved that the person indicated has been sentenced to preventive detention, that is all that need be proved, and when that has been proved, the conviction as a habitual criminal follows. That does not dispose of the matter, because the conviction as a habitual criminal is only of importance for the purpose of enabling the Court to sentence the man to a term of not less than five years', or not more than ten years' preventive detention. But there was no power in the criminal courts to sentence a man to preventive detention in addition to the punishment inflicted for the crime in respect of which he had then been convicted save under this Act of 1908, which has introduced a new form, not as a matter of punishment, but as a method of providing opportunities for the reform of a person who has, within the meaning of the Act, habitually spent his life in crime.

Now it becomes necessary to see whether, when a man is properly convicted of being a habitual criminal, as this man was, the Court is bound to pass a sentence of preventive detention. The offence in this case was that of breaking and entering a shop with intent to steal; nothing in fact was stolen. It is unnecessary in the circumstances to go through the facts in detail. In view of the record of the defendant the Court felt bound, more especially having regard to the observations made in *William Davis*, to pass a sentence of preventive detention once it had passed a sentence of three years' penal servitude. I will not go through or enumerate the record of this man; it is sufficient to say that he had been convicted of being a habitual criminal before. He was charged with an offence in this case before he was charged with being a habitual criminal, and consequently he became legally amenable to the jurisdiction of the Court, and the Court could, if it thought fit, sentence him to a term of preventive detention.

In my view, once there has been a conviction as a habitual

1920
23 *February.*

GEORGE STANLEY.

Reading L.C.J.

criminal, it does not follow that the Court must pass a sentence of preventive detention. The Court has a discretion; indeed the language of the sub-s. shows, first, that there must be a sentence of penal servitude passed, and then if the Court is of opinion "that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, it may"—observe, not shall—"pass a further sentence, ordering that after the expiration of the sentence of penal servitude" a sentence of preventive detention shall be served. That gives the Court a discretionary power. We desire to say that in our view, although we agree entirely with the decision of *William Davis* and the unreported case of *Collins*, neither of those decisions stated, nor is it the law, in our opinion, that the Court must pass a sentence of preventive detention.

Now we come to examine the facts of this case and to see whether there are circumstances to be taken into account in this man's favour, and whether we think it is necessary within the language of the sub-s. which I have already quoted, to sentence him to preventive detention. His last sentence before the crime into which we are now enquiring was in July, 1910, but he was not released until September, 1916. When he came out it appears that he worked for a month after his discharge. That brought him to October, 1916, when he reported himself to the Central Association for the Aid of Discharged Convicts, and enlisted in the army. He served in France. He suffered from trench fever, was brought back to hospital in England, and when he recovered he was transferred to the Royal Flying Corps, and he was demobilised in January, 1919.

During all this time he communicated regularly with that Association, and in September, 1918, when he had been serving for two years, he was excused by the Secretary of State from making any further reports to the Association in view of his satisfactory conduct since discharge. He was told of this, but nevertheless he continued to keep in touch with the Association. He told them that he had been demobilised in January, 1919, and again told them in March, 1919, that he was registered at the Employment Exchange. He does not seem to have communicated with them after that, but he communicated with them after he was excused from doing so. His character in the army was very good.

1920
23 *February.*

GEORGE STANLEY.

Reading L.C.J

In these circumstances, what ought we to say with regard to this man? We have come to the conclusion that, dealing with the sentence of preventive detention by itself for the moment, this is a case in which the Court ought not to impose a term of preventive detention; that we ought to take into account the life that he has lived since he came out of penal servitude, and in particular, his record in the army, where he appears to have earned a very good character, and so far as we can ascertain from all the evidence before us, he has done his best to redeem his past, to acquit himself well at a time of national emergency. These facts ought to weigh in his favour, and therefore we think that he ought not to have been sentenced to the term of preventive detention and that sentence will be quashed.

It is right to say that the Deputy-Chairman who sentenced him thought he was bound by the authorities so to construe the Act of Parliament that a sentence of preventive detention must be passed in this case.

That leaves us with the term of three years' penal servitude, which is a condition precedent to the right of imposing a sentence of preventive detention. We have come to the conclusion that, having regard to this man's record since he left punishment for past offences, three years' penal servitude was too severe a sentence, and that a sentence of twelve months' imprisonment with hard labour was a sufficient punishment for the offence which he had committed, taking into account all that had happened.

The consequence is that the term of three years' penal servitude will be reduced to twelve months' imprisonment with hard labour, and the sentence of preventive detention will disappear altogether.

We are indebted to the Director of Public Prosecutions for having brought to our attention the various authorities upon the point.

Sentence of preventive detention quashed.

Primary sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE SANKEY.

CHARLES WOOD.

1920
1 *March.*

The material time for the conviction or charge or "bad character," the suggestion of which is prohibited by s. 1 (f), *of the Criminal Evidence Act* 1898, *is that of the trial, and, therefore, though the trial be for an offence alleged to have been committed before that which it is proposed to put to defendant in cross-examination, yet a conviction for such subsequent offence is not inadmissible in evidence merely on the ground of its relative lateness.*

Severity of sentence.

Appeal against conviction and sentence.

Appellant was convicted, at the Middlesex Sessions, before the Chairman, on February 7th, 1920, of indecent assault, and on February 9th, 1920, of indecent assault on a second count, tried by a different jury. He was sentenced to seven months' imprisonment on each conviction (consecutive).

F. J. Newman for the appellant, who was present. Appellant was charged on two counts with indecent assault. He was first tried on a count which charged him with committing the offence at 8 o'clock on November 29th, and convicted. He was afterwards charged before a different jury on the other count, which charged him with a similar offence relating to another woman at 7 o'clock on the same evening. At the second trial, on February 9th, appellant's counsel cross-examined a witness for the prosecution with regard to appellant's character previous to November 29th, 1919, and thereupon counsel for the Crown cross-examined appellant and elicited evidence of the conviction of the appellant on the first count, which related to an offence which was committed after the offence with which he was then being tried. It is submitted

1920
1 *March.*

CHARLES WOOD.

Reading L.C.J.
Darling J.
Sankey J.

that this evidence was improperly admitted. Sect. 1 (f) of the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, provides that "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character. . . ." Evidence of offences taking place subsequently to the offence which is the subject of the charge ought not to have been admitted.

It is submitted that the sentences should be made concurrent.

G. D. Roberts for the Crown was not called upon, except on sentence. He left the question of the sentence to the Court.

The LORD CHIEF JUSTICE, having dealt with other points raised on behalf of appellant, said that the last point taken by counsel for appellant was that evidence was admitted on the second trial that appellant had been convicted of an offence which in fact was later than the offence with which he was then being tried. Counsel complained of the cross-examination of appellant. But it was a perfectly legitimate cross-examination, and was within s. 1 of the Criminal Evidence Act, 1898. The legislature meant to give a person charged the benefit of being tried as if he was a man against whom there was nothing known. For the first time—in general terms—a person charged with an offence was allowed to give evidence, and the section was passed to prevent the prisoner being prejudiced by cross-examination to credit, which is admissible in other cases, for testing the credibility of the witness. But if the defence choose to give evidence that he is a man of good character, whereas he is a man of bad character, then they are asking the jury to try the case on a false ground, and the prosecution are not only entitled, but bound to shew that he cannot be put on that high pedestal.

Here it is said that this cross-examination was in respect of an offence later in time than that for which he was then being tried. The answer is that it went to shew that he was not of good character at the time of the trial. That is the material time.

1920
1 *March.*

CHARLES WOOD.

Reading L.C.J.

There is no ground of complaint with regard to the trial, and the appeal against the conviction fails.

In respect of the sentence, it is to be observed that the jury recommended the prisoner to mercy on the first trial. The learned Chairman sentenced him to seven months' imprisonment, *consecutive*, on each count, with hard labour. We think, in all the circumstances, that the sentences should be concurrent.

Sentence reduced.

Solicitors for Appellant—*Breeze and Wyles.*

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

1920
15 *March.*

FREDERICK ROTHWELL HOLT.

Application under s. 9 (d) *of the Criminal Appeal Act,* 1907.

Applicant was convicted at the Manchester Assizes, before Mr. Justice Greer, on February 27th, 1920, of murder, and sentenced to death.

Wingate-Saul, K.C. (with him *Bertram Long*) for the applicant, who was not present. The application is that a surgical examination may be made of the applicant to determine whether he was suffering from a cerebral disease which would render him so insane as not to be responsible in law for the crime of murder The application is made necessary by reason of certain medical evidence which had come to light since the trial.

[The LORD CHIEF JUSTICE: Was there any evidence of insanity at the time he committed the murder?]

Medical evidence was not called at the trial. The first issue was whether the defendant was fit to plead, and on that issue, which the jury decided in the affirmative, medical evidence was called. Then the trial proceeded before another jury, and no medical evidence about his sanity was given before that jury.

On the last day of the trial, on February 27th, Sir E. Marshall Hall, K.C., who was leading for the defence, received a telegram from a Dr. Day, who had for years resided in Malay but was now in England, saying that he had known and treated defendant in Malay in 1917, and that his observations of defendant in 1917 might assist the Court.

1920
15 *March.*

FREDERICK ROTHWELL HOLT.

Reading L.C.J.
Bray J.
Avory J.

Dr. Day had made an affidavit in which he said that he discovered, too late to give evidence at the trial, that defendant was the person whom he had treated in 1917 in Malay. Defendant, in 1917, came to him suffering from syphilis, for which he treated him, and told him to continue the treatment with mercury for two years. He was not then insane, but he was of such abnormal mentality that he was the more likely to become insane should the syphilis affect his brain. According to the affidavit the doctor thinks that defendant is now in the early stages of general paralysis of the insane. It was only by an examination of his nervous system and a surgical examination [of the cerebro-spinal fluid by means of a lumbar puncture] that the existence or non-existence of early cerebral disease could be definitely established. Certain disclosures would make it reasonable to assume an incapacity to distinguish between right and wrong.

Dr. Robert Percy Smith, who had examined the applicant, had also made an affidavit corroborating Dr. Day.

Application has been made to the Home Secretary, who said that it was a matter for the Court of Criminal Appeal. But the Home Secretary said that if an intimation is given by the Court that an examination should be made, effect would be given to it.

[The LORD CHIEF JUSTICE: Have we power to deal with this application?]

Yes. There is power under sect. 9 of the Criminal Appeal Act, 1907. Under that section, sub-s. (d), the Court may, "Where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special Commissioner appointed by the Court, and act upon the report of any such Commissioner so far as they think fit to adopt it."

[The LORD CHIEF JUSTICE: There is no evidence of the applicant's condition at the time of the murder. We are now asked to indulge in a speculative discussion with regard to the effect syphilis may have had on the applicant. How can the Court be asked to

1920
15 *March.*

FREDERICK ROTHWELL HOLT.

Reading L.C.J. Bray J. Avory J.

act on evidence of that sort? It means that the doctor goes into the witness box to speak not of fact, but of theory. How can the Court, upon such speculative discussion, decide whether the man at the time of the murder was in a condition of mind to know the difference between right and wrong? An application for leave to appeal was entered on March 6th, yet there was no indication of an application for leave to call further evidence.]

An application for leave to call further evidence has not yet been made, but it will be made.

Roland Oliver, for the Crown, was instructed to take the directions of the Court on the matter, subject to the wish of the Court to hear arguments on the point of jurisdiction.

The LORD CHIEF JUSTICE: It is undesirable to say more at this stage than that there is not sufficient ground shewn for the order which the Court is asked to make. Nor do we express any opinion on the question of jurisdiction. We deal with the application on the view indicated by the Secretary of State, that a suggestion by the Court would be sufficient for him to order the examination. In our opinion there is not sufficient before the Court to lead it to make that suggestion, and, so far as the Secretary of State chooses to be guided by the Court the matter must be left where it was before the application was made. When the case comes before us on appeal, then it may be that there will be an application for leave to call further evidence. If the Court gives leave to call further evidence, it may be that sufficient evidence will be given without an examination being made. But the Court will make no order nor make any suggestion at this stage.

Application refused.

Solicitors for Applicant—*Pritchard, Englefield & Co.*, agents for *Callis and Woosnam*, Blackpool.

JAMES PAUL AND ROBERT McFARLANE.

1920
15 *March.*

A co-defendant who goes into the witness-box is, for the purposes of cross-examination, exactly in the same position as any other witness, even if his evidence in chief is merely a confession of guilt, and he may be cross-examined by the Crown with a view to incriminate his co-defendants.

Applications for leave to appeal against convictions and sentences.

Appellants were convicted before the Recorder at the Central Criminal Court, on February 12th, 1920, of warehouse-breaking, and were each sentenced to five years' penal servitude.

G. St. John McDonald for the appellants, who were not present. Appellants were charged jointly with three other persons with warehouse-breaking, and with stealing furs of the value of 3,000*l.* A number of men were concerned in the robbery, and the furs were taken away in a motor lorry. Appellants set up an *alibi*, and evidence was called to establish it. Goldberg, one of the defendants charged jointly with appellants, was not represented by counsel and first elected to make a statement from the dock. Then at the end of the case for the defence he was again asked by the Recorder whether he wished to go into the witness-box. He was sworn, and said, "I plead guilty," and had nothing more to say. Thereupon counsel for the prosecution cross-examined Goldberg and elicited from him evidence against the two appellants. In cross-examination Goldberg said that the two appellants arranged the robbery, were present at it, sold the stolen furs, and shared the proceeds among the men taking part in it. No objection was taken at the time to this cross-examination.

It is submitted that the cross-examination was irregular in that it infringed s. 1 of the Criminal Evidence Act, 1898. That s. 1 made a person charged with an offence a competent witness for the defence only, but when the only evidence given by the person charged is that he is guilty, there is no issue left to be tried in his case. The issue is dead, and the prosecution is not entitled to cross-examine him. If an accused person gives evidence, he may be cross-examined with regard to that evidence, but he cannot be cross-examined with a view to establishing the guilt of a

1920
15 *March.*

JAMES PAUL AND ROBERT MCFARLANE.

Reading L.C.J. Bray J. Avory J.

co-defendant unless he gives evidence for that co-defendant. An accused person is a competent witness for the defence only, and not for the prosecution. (It was submitted that the only explanation of s. 1 of the Criminal Evidence Act was given in the Manual of Military Law, 6th ed., ch. vi., s. 84.)

[AVORY J. referred to *James Macdonell* (or *Macdonald*), 2 Cr. App. R. 322; 73 J. P. 490: 1909; and *Hadwen*, 1902, 1 K. B. 882; 71 L. J. K. B. 581; 20 Cox C. C. 206; 66 J. P. 456.]

The convictions should be quashed.

The LORD CHIEF JUSTICE: The main point in these applications is that counsel for the prosecution ought not to have been allowed to cross-examine Goldberg after he had admitted that he was guilty, and that, as counsel had cross-examined Goldberg with a view to incriminating the appellants, who were jointly charged with him, the convictions of the appellants were viated, and the appeals ought to be allowed. The argument is based on s. 1 of the Criminal Evidence Act, 1898. It was argued that although the Act of 1898 made a person charged a competent witness for the defence, yet if the person charged goes into the box and says that he is guilty, he cannot be cross-examined by the prosecution, as the issue is then dead. But that argument is fallacious. When a person charged goes into the witness-box to give evidence for the defence, and has been sworn, he is in the same position as an ordinary witness, and is therefore liable to be cross-examined. It is immaterial whether he stands mute, or whether he gives evidence for the defence or for the prosecution. It is not what he says in the witness-box that renders him liable to cross-examination, but the fact that he is called as a witness for the defence. As soon as a person charged goes into the witness-box as a witness for the defence, and is sworn, counsel for the prosecution is entitled to cross-examine him.

It has also been contended that counsel for the prosecution is not entitled to cross-examine a person charged who is called as a witness for the defence so as to incriminate a person charged jointly with him. That contention is a novel one. No case was cited in support of it, and it is also contrary to the usual practice,

and in the opinion of the Court it entirely fails. There is no ground for giving leave to appeal against the convictions.

The appeals against sentences are dismissed.

1920
15 *March.*

JAMES PAUL AND ROBERT MCFARLANE.

Reading L.C.J.

Appeals dismissed.

Solicitor for the Appellants—*Bruce Searl.*

T. W. M.

ALBERT BARTLETT, ALFRED BRADBERRY AND SAMUEL GREEN.

16 *March.*

Non-direction, on charges of receiving stolen goods with guilty knowledge, may amount to misdirection leading to the quashing of a conviction.

Appeals against convictions and sentences.

Bartlett and Bradberry were convicted of receiving, and Green of larceny, at Staffordshire Quarter Sessions, before the Chairman, on February 10, 1920. Bartlett was sentenced to 9, Bradberry to 18, and Green to 12 months' imprisonment with hard labour.

Lort-Williams for the appellants, of whom Bartlett and Green were present. The grounds of the appeals are misdirection and that the verdicts are unreasonable in view of the evidence. The case made against appellants rested on their suspicious behaviour in the Dog and Gun public-house at Tettenhall, Wolverhampton, where the alleged theft took place; and on false statements made by them afterwards. On the date of the theft, January 5, 1920, appellants, who came from Birmingham, went to the public-house at Tettenhall. Evidence was given that they were strangers and that their conduct aroused suspicion. The Chairman, in the course of his summing-up said: "In this case, as in almost all others, you have no direct evidence. It will be for you as men of the world to consider between yourselves whether the indirect evidence is sufficient for you to find these men guilty or not. Here are men who go to a public-house absolute strangers, but when accused of having been there deny having been there at all, and deny it in such a positive way that it is almost impossible to believe that an innocent person would make a denial in that

1920
16 *March.*
ALBERT BARTLETT, ALFRED BRADBERRY, AND SAMUEL GREEN.
Reading L.C.J. Bray J. Avory J.

way. They are also accused of being friends and they deny that again. It seems to me that that was a deliberate falsehood, and one that need not have been made, and one that would not have been made if the consciences of these men had been clear."

There was no proper direction either on the law or on the facts. [He was stopped by the Court.]

Harold Hardy, for the Crown. There was no miscarriage of justice. The jury were satisfied upon the evidence that Green committed the robbery, and that Bradberry and Bartlett were acting in concert with him. Bartlett said he was not there and Green called evidence to prove an *alibi*.

THE LORD CHIEF JUSTICE: The case against the appellants was based on evidence of suspicious conduct in the public-house, and they had made untrue statements afterwards when accused of having been there. Suspicion is not sufficient to convict on. This is a case in which a careful summing-up on the part of the judge was necessary, but it is sufficient to say that there was no direction on the law, and the direction with regard to the facts was not satisfactory The convictions must be quashed.

Convictions quashed.

Solicitor for the appellants—*J. Hall-Wright*, Birmingham.

T. W. M.

IN THE HOUSE OF LORDS.

1919—20
16, 18, 19 *Dec.*;
5 *March.*

DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty)
v. *Beard.*

Coram: The Lord Chancellor, the Earl of Reading, L.C.J., Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Buckmaster and Lord Phillimore.

Insanity whether produced by intoxication or otherwise is a defence to a criminal charge.

When a specific intent is a necessary ingredient of the offence charged, the jury may take into consideration evidence going to shew that the defendant was so intoxicated as to be unable to form such intent.

Evidence of intoxication falling short of such incapacity, though it may establish a more ready tendency to some violent passion (than if defendant were sober) does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts.

There is an essential difference between a defence founded on insanity and one founded on intoxication, and in a direction to a jury care must be taken to distinguish between the tests in each case respectively, and in the latter there should be a distinct warning that there is no plea of insanity, and, except on that plea, the question whether defendant "knew that he was doing wrong" is irrelevant.

Observations on Meade, 2 *Cr. App. R.* 54, 1909 *(the true rule in which it narrower than that accepted by the Court of Criminal Appeal and on other cases where the defence was founded on intoxication).*

Order of the Court of Criminal Appeal (above, p. 117*;* 36 *T. L. R.* 96*) reversed.*

Appeal from the Court of Criminal Appeal, p. 110 above.

1920
1 *March.*

The *Attorney-General* (with him the *Solicitor-General, Sir Ellis Griffith, K.C., Sir Richard Muir, G. A. H. Branson,* and *Ralph Sutton*), for the Crown. The appeal is brought for two reasons: (1) In the Court of Criminal Appeal it appeared to be laid down that in such a case as this, defendant, if the defence is drunkenness, is entitled to a more favourable summing-up than that to which he would be entitled if the defence were insanity, and (2) The judgment of the Court of Criminal Appeal affirmed

1920
1 *March.*

ARTHUR BEARD.

its own judgment in *Meade*, 1909, 1 K. B. 895; 78 L. J. K. B. 476; 73 J. P. 239; 2 Cr. App. R. 54, and appeared to say that in all such cases as this the right summing-up is such as that which was commended and approved by that Court in *Meade*.

Mr. Justice Bailhache, in his summing-up, used the word "drunk" more than once, not in the ordinary acceptation of the term. He really meant no more than that defendant had been drinking. He indicated to the jury that the evidence of complete intoxication was very slender.

[The LORD CHANCELLOR: I do not think you must exclude the consideration of the evidence dealing with the issue of intoxication.

LORD SUMNER: I understand *Meade's* case to refer to incapacity following upon drunkenness; therefore, if *Meade's* case is in question, the evidence of degree of drunkenness may be material.]

Among the questions which your Lordships will be invited to consider is the question whether, even if the decision of the Court of Criminal Appeal in *Meade* was right, nevertheless it had no useful application to the facts of this case. The crime on which this man was engaged was a different kind of crime from that on which *Meade* had been engaged.

In the course of his summing-up the learned judge directed the jury that "if a man is assaulting a woman or girl, and the woman or girl, in order to resist him, screams and struggles, and the man, in order to effect his purpose, puts his hand upon her mouth and suffocates her, he is guilty of murder, and it is no use at all to say, 'I only intended to stop her screaming, I did not intend to kill her.' That is no defence, in my judgment. A woman is entitled to defend herself by every means in her power, and if a man does something to her which in fact kills her, he is guilty of murder. So that if you accept the prisoner's statement and the evidence which has been given, there would be no alternative in this case but to find him guilty of murder. But it has been urged by counsel for the defence—the only thing I think he could urge in this case—that although that might be the case if the man was sober, yet where the offence is committed by a drunken man, then the crime is reduced to manslaughter. I

want to examine that proposition, and to see how that stands. Now there is no doubt, I think, in the mind of any of us, that if this man had not been drunk he never would have done what he did. I think there is very little doubt about that if this man had not been drunk, the little girl would have been alive at this moment. It is no defence to say 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing, or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this. Supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says 'I was mad and turned into a brute by drink,' it is no defence unless he satisfies you that he was so far out of his senses that he did not know what he was doing. But what are the facts in this case? This man had been drinking—there is not very clear evidence of it—but it is admitted on all hands that he had been drinking for some time. We have had evidence that he was drinking with Jones at two public-houses. Jones was pressed about it, and he said, 'I can't say he was drunk, and I won't say he was sober.' He bought a bottle of whisky and took it, or part of it, to the works with him, and when Jones came to see him at 20 minutes or a quarter to seven, within a few minutes—as we know it now—of this poor child being killed, he had a teacup full of whiskey and water. Jones says to him, 'It is time we went to the lodge,' and Beard, who is said to have been so absolutely drunk and out of his senses, said, 'Let me go and wash my hands and I will be with you in a minute.' Then they start off, and Beard remembers that he had left the whisky bottle behind and goes back for it. He goes to the club and is introduced to the chairman and has more drink with him, and has probably more drink during the rest of the evening, but he gets back to the mill; he is not so drunk that he does not know his way back. When Mr. Clegg saw him at 6.15, immediately before the girl was killed, he says, 'I noticed nothing wrong about him, or I would not have left him at the works. It would be better having no watchman than a drunken watchman, for there is no telling what mischief a drunken

1920
1 *March.*

ARTHUR BEARD.

man might cause.' But Clegg says, 'I noticed nothing peculiar about him.' Another man, Nelson, who saw him shortly afterwards, says that he had been drinking, but he would not say he was drunk. He is sufficiently sober to know that his hands are dirty, and he washes them. He is sufficiently sober to remember that he left the whisky bottle behind him, and, even after having more drink, he is sufficiently sober to answer questions about his wages, and so on. Is it reasonable to suppose that he did not know what he was doing at this time? Is it possible to accept that suggestion? As I have already said, if this man had not been drinking this terrible crime would never have been committed. I am sorry to say it, but I suppose about 80 per cent. of crimes of violence have been committed by people who were drunk at the time, or been recently drunk; but if that is an excuse for crime, then all a man need do is to get drunk and then commit the crime. Murder is reduced to manslaughter if a man is so drunk that he does not know what he is doing, or that what he is doing is wrong. There are two alternative verdicts which you can return. One is the verdict of wilful murder; the other is the verdict of manslaughter. I have explained to you in what circumstances you can return a verdict of manslaughter. I have explained to you in what circumstances you can return a verdict of manslaughter and to what extent drunkenness is a possible excuse, not to render it no crime at all, but to reduce murder to manslaughter. There is no suggestion here that there can be a verdict of not guilty. That is not asked for, nor could it be asked for. The alternative verdicts are murder or manslaughter. It is for you to say which of these two crimes this man has committed—whether he is guilty of the full crime of murder, or whether he has satisfied you that he was so drunk as to reduce the crime to manslaughter. If you have any doubt about it you will give the prisoner the benefit of the doubt and return a verdict for the lesser offence; but if you have no doubt about it, then it is your plain duty to return a verdict for the greater offence, however serious and tragic the consequences may be."

There was evidence of a terrible struggle between the girl of thirteen years of age and this man. It is evident that in consequence of her struggle her vitality was lowered a great deal and she was in an exhausted state.

[VISCOUNT HALDANE: It was not the act of rape that killed

her. It was the suffocation, but the act of rape gave her a shock which predisposed her to suffocation.]

Yes.

[LORD BUCKMASTER: The question is the condition he was in when he killed her, and what was the right direction to give the jury on that point.

The LORD CHANCELLOR: May not the question be the intent which defendant's mind was capable of forming at the time he addressed himself to violation before suffocation?]

Yes.

[VISCOUNT HALDANE: The jury said, in effect, that this man knew that what he was doing was wrong; that is to say, that he knew that committing rape was wrong. If they found that he was in a state of mind to be guilty of rape, then whatever happened consequentially on that—rape, suffocation, or anything else—did not matter. He was committing a felony and consequences followed. If I am endeavouring to commit a felony and in the course of committing that felony do something that kills somebody, does it matter what my frame of mind was if I meant to commit a felony and what happened were the natural and probable consequences?]

That was the old doctrine.

Stephen J., was in favour of mitigating the strictness of the old rule so as to make it read that if a man is committing a felony and in the course of committing the felony he does an act of which the natural and probable consequences is death, then he is guilty of murder.

[VISCOUNT HALDANE: But supposing he is honestly committing a felony, not intending to kill anybody, and in the course of committing a felony he does kill a person, has he not killed him with malice in law?

LORD PHILLIMORE: If a man is intending to do grievous bodily

1920
1 *March.*
ARTHUR BEARD.

harm to another, or to commit rape, and in so doing kills a person, the Court of Criminal Appeal rightly laid down that that is murder.

The EARL OF READING: What they decided on this point was that where there was felonious violence, and death resulted from some act done in the course of or in furtherance of the felony, then there could be no question but that it was murder according to law.]

The summing-up of the learned judge was on the facts of this case quite right. It was quite obvious that the man knew he was committing the offence of rape. He also knew what he was doing when he put his hand on her mouth to stop her screams, and he was doing something furthering the felony in which he was engaged.

[LORD ATKINSON: An act which in other circumstances would only be a common assault may, if it be one of the acts in aid in helping the main felony of rape and the victim is killed by it, be murder. Although it may not have been an act *per se* which would have inflicted grievous bodily harm at all, if it is an act in aid of a felony leading to death, I should have thought murder was committed. Then it is quite evident here that the learned judge took his statement from the fifth question in *McNaughton*. Is the question to be framed in a way that is more favourable to defendant when he has by his own act made himself insane than if providence made him insane?]

It was laid down in *McNaughton* that the proper direction to the jury, where the defence is insanity, is that the learned judge should say that the man is deemed to be responsible for his actions, but if in consequence of disease of mind he is in such a condition as either not to know the nature and quality of his act—*e.g.*, he thinks he is peeling an apple whereas in fact he is cutting a throat —or, knowing what he is doing, not to know that what he is doing is wrong, he may be excused. Where the defence is insanity, the defence has first of all to establish disease of the mind. Then there are only two loopholes of escape. The insane person must not have known what he was about, or if he did know it, he must

not have known that what he was doing was wrong. The learned judge here assumed that two-fold distinction and left no third alternative. The complaint against the summing-up in this case is that in the case of a man who said he was drunk when he did the act, he ought to be given the benefit of not only the two defences under insanity, but of a third alternative as well, namely, that he knew what he was doing and he knew it was wrong, but by reason of the liquor that was in him he did not appreciate that what he was doing was dangerous, and that is to say that it was likely to inflict grievous bodily harm. If that is the law as laid down in *Meade*, it is submitted that it is wrong It may be that there are cases in which the direction suggested in *Meade*, properly construed—it is submitted that the words are too large and vague—is the right direction. But even if it be so, it could not have been the right direction in this case. The right direction in this case was in substance what the learned judge gave. In *Meade* tenderness to the defence of drunkenness was carried further than it had previously gone.

[LORD DUNEDIN: *Meade* laid down a regular canon and then said, "We do not find that the summing-up in this particular case was against the canon we have laid down and therefore leave it alone."

LORD ATKINSON: They practically struck out from the test in *McNaughton's* case the words "doing what was wrong," and they put in "doing what was dangerous"

The EARL OF READING: If you apply the test of insanity (*McNaughton*) which was applied by the learned judge here, this difficulty must be considered. In cases of insanity by Act of Parliament there is a special verdict which is "guilty, but insane," which this House has decided is not a conviction, but is a decision that the act was done, but that the person committing the act was not in a condition to form an intention, and therefore he is not guilty of the crime, and he is only detained in an asylum. If the test of insanity is to be applied to the present case, and the jury come to the conclusion that in such a case of drunkenness the man did not know what he was doing, or did not know that

1930
1 March.

ARTHUR BEARD

what he was doing was wrong, logically the conclusion seems to me that he must be acquitted.]

Where the defence is insanity, the foundation of that defence is evidence which goes to show that defendant was at the time of committing the offence suffering from mental disease. In the case of drunkenness there is no such allegation of mental disease. It is a temporary state induced by the man's own voluntary act. He is not to have more loopholes than those which are offered to an insane person whose condition is mental disease. Drunkenness gets rid of the intent, but the man is responsible for the drunkenness which mitigates the offence. Supposing no question of rape was involved, or of any other criminal act, but that the man had been annoyed by the screams of the child and simply to prevent the screams from continuing had endeavoured to stop them forcibly, intent would then be very material.

[LORD ATKINSON: A man is presumed to intend the natural consequences of his own act. That is implied intention. He may be so drunk that the implied intention is rebutted. Does it go the slightest degree further than that?]

I submit not.

[The EARL OF READING: The verdict is not one of rape. The verdict is one of murder, and the question is whether it is murder or whether a direction should have been given which left it to the jury to say, "In this case we find not murder, but manslaughter." That is the real point in the case, is it not?

LORD PHILLIMORE: You say that it is murder, and that if in intending to ravish the child he kills her, then it is immaterial whether the act of suffocation was intended to kill her or not; in fact it did kill her. That is how you put it?]

Yes. The man was evidently not so drunk as to be incapable of forming a criminal intent. It was never suggested on his behalf with regard to ravishing the child that he did not know what he was doing or thought that he was entitled to do it. But it was suggested with regard to the subsidiary act of stopping her screams that he was so drunk that he did not know that in

putting his hand on her throat and mouth he was doing something which was likely to inflict on her serious bodily injury.

[LORD BUCKMASTER: Do you say that where a man is indicted for murder arising out of the act of rape drunkenness could never be pleaded?]

I do not go so far as that.

[The LORD CHANCELLOR: Need you? A man might not be so drunk that he did not know what he was doing, but he might be in such a state of bestiality that he was ready to attempt violence.]

He would be temporarily in the condition of an insane person.

[VISCOUNT HALDANE: Is not the question before us whether the learned judge ought to have told the jury, "It is quite plain that this man knew and was intelligently aware that he was committing the crime of rape, but the question I have to put to you is, although he knew that, was he not so drunk as not to know that in committing the crime of rape there might be consequences of an injurious nature?"]

Either the judgment in *Meade* has a general application, in which I submit it is wrong, or it is limited to a particular class of cases, in which event it ought to be so expressed.

[The EARL OF READING: Are you quite right in saying that the defence of drunkenness would not have been in exactly the same position if the trial had been for rape? The question is intention, and the answer is that this man has drunk so much that he is not capable of forming the intention. If he had been tried for rape, could not he (disregarding for the moment the improbability of success) have set up that plea?]

The defence of drunkenness was urged solely with regard to the act of suffocation, that he was in such a condition that when he placed his hand on and applied pressure to the mouth and throat of this child he did not appreciate that he was doing a dangerous

1920
1 *March.*

ARTHUR BEARD.

act. Then if the direction indicated in *Meade* were to be of general application it would be applicable in the case of rape.

[The EARL OF READING: I want to guard against its being said that if the man had committed rape there could be no answer to it. It is not necessary to discuss that here because the charge is murder, not rape.]

There is only one reported case where the defence of intoxication was put forward to a charge of rape. It was *John Burrows*, 1 Lewin, 57: 1823. In that case, Holroyd J. said: "It is a maxim of law that if a man gets himself intoxicated he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not amenable."

[LORD BUCKMASTER: As a general statement that is surely wrong.]

No doubt it goes a little further in its generality than one would expect it to go. If *Meade* is general so as to apply to all cases it is wrong. In any event it does not apply to this case. If this man was engaged in committing the felony of rape, and in the course of committing that felony he did an act in furtherance of it, applying violence to prevent the screams of the child, it is immaterial whether in applying that pressure he appreciated or did not appreciate that what he was doing was dangerous. It is a fallacy to pick out one element in this criminal transaction and make the case depend on that.

Drunkenness is not an excuse for crime, but where a particular intent is of the essence of the crime and has to be proved as something apart from the acts, drunkenness may be material on the question whether that intent was or was not present. A person who does acts which otherwise are criminal acts because he is drunk ought to be in a worse position than an insane person. I refer to *Her Majesty's Advocate* v. *John M'Donald* in 2 White's Justiciary Reports, 517: 1890. There the charge was assaulting a man and also assaulting his own wife with a piece of wood and

1920
1 *March.*

ARTHUR BEARD.

a piece of iron and killing them both. Lord Kingsborough, the Lord Justice Clerk, in summing-up, said: "The only defence attempted with any show of plausibility is that the prisoner was of unsound mind when the acts charged against him were done. A defence of insanity can only be supported by proof that the prisoner was actually of unsound mind at the time. It is said that he had taken so large a quantity of ardent spirits that he was insane. Now a man who is merely drunk is not held by the law to be insane merely because he is drunk. . . . The law holds that the man who brings himself into that state by drinking alcohol is responsible for what he does when he is in a state of drunkenness, just as a man is responsible to the law, and is severely punished by the law, when he allows himself to get into such a fury that he acts like a madman and inflicts injuries on others . . . . the principle of the law is that a man is not excusable for what he does because he has done it when in a state produced by taking a quantity of liquor." Then he quotes Hume on Crime, vol. 1, p. 45, ch. 1, art. 3, as saying: "But however this may be certain it is that the law of Scotland views this wilful distemper with a quite different eye from the other [insanity] which is the visitation of providence, and if it does not consider the man's intemperance as an aggravation, at least sees very good reasons why it should not be allowed as an excuse to save him from the ordinary pains of his transgression. Not to mention that one cannot well lay claim to favour on the ground of that which itself shows a disregard of order and decency, how are the different degrees of ebriety to be distinguished, or the real ebriety to be discerned from that which is affected; or what protection could we have if this were law against the attempts of such who might inflame themselves with liquor on purpose to gain courage to indulge their malice and an opportunity to do it safely?"

[The EARL OF READING: It was the view expressed by Coke, and Hale, and Blackstone, that what is called voluntarily contracted madness, which is the term used for drunkenness, is no excuse, and cannot put a person in a privileged position. The question is to what extent the cases during the last 50 or 60 years have relaxed the rigidity of the law in that respect.]

In fact the law has been relaxed to a much less extent than

1920
1 *March.*

ARTHUR BEARD.

appears to be suggested by *Meade*, but not to a less extent than that language suggests if it is construed as referring only to a very limited class of cases.

In *Grindley*, 1 Russ. Cr. 7th ed. 88: 1819; Holroyd J. said: "Though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration."

If half a dozen persons contrive to introduce alcoholic poison somehow or other into a man's body so as to render him senseless, then it might be said that the man at the time of committing an act was quite senseless and was not responsible for that condition of senselessness.

[LORD BUCKMASTER: I cannot understand how the responsibility for the condition under which he became senseless is relevant.]

It may be material on the question of the proposition that a man is responsible for his acts.

[The EARL OF READING: The classical writers draw a distinction between voluntarily contracted madness and that which is involuntary.

LORD DUNEDIN: Perhaps they did not think that there was any such thing as involuntary drunkenness.]

The difference may be material because the problem we have to consider is, was this man responsible, and ought he to be convicted of murder? And if he was not responsible at all himself for the condition in which he was, and it was the result of the contrivance of others, that helps the proposition that a man is responsible for his acts.

The next case in order of date is *Carroll*, 7 C. & P. 145: 1835, in which *Grindley* was relied upon, but was disapproved by the Court. Holroyd J. took a different view in *Burrow*, 1 Lew. 75: 1823, to that taken by him in *Grindley*.

1920
1 *March.*

ARTHUR BEARD.

The question of constructive murder was dealt with by Stephen J. in *Serné*, 16 Cox C. C. 311: 1887. He said that according to the general rule a man who in the course of committing a felony does an act which causes death is therefore to be guilty of murder. He is guilty of murder if in the course of committing a felonious act he does an act which is known to be dangerous to life and likely in itself to cause death.

In *Rennie*, 1 Lew. 76: 1825, the offence was burglary, and the defence was that defendant was drunk. Holroyd J. said: "Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong."

Pearson, 2 Lew. 144: 1835, was an indictment for wife murder. It was proved that in a fit of drunkenness defendant had beaten her in a cruel manner with a rake shank, and that she had died of wounds and bruises. The only defence was that he was drunk, and Park J. said that voluntary drunkenness is no excuse for crime, and there is the question of sudden provocation.

[LORD BUCKMASTER: You do not contend for this doctrine now?]

No. What I am concerned to deny is that there has really been a relaxation of the rule except in a limited class of cases where intent has necessarily to be proved in a strict sense.

Meakin, 7 C. & P. 297: 1836, was a case of stabbing with intent to murder. Baron Alderson said: "It is my duty to tell you that the prisoner's being intoxicated does not alter the nature of the offence—if a man chooses to get drunk it is his own voluntary act; it is very different from madness which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from he must answer for. However, with regard to the intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used which, if used, must produce

1920
1 *March.*

ARTHUR BEARD.

grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." He referred to *Stopford*, 11 Cox C. C. 643: 1870, wounding with intent to do grievous bodily harm, and *Doherty*, 16 Cox C. C. 306: 1877.

The cases down to the year 1877, although they undoubtedly involve a relaxation of the rule that in no circumstances is drunkenness an excuse, they go no further than to say that where in order to establish guilt of the crime charged it is necessary to prove a particular intent, drunkenness may be taken into account on the question of guilty intent. It is difficult to see how *Monkhouse*, 4 Cox C. C. 55: 1849, supports the proposition laid down in *Meade* regarded as a general proposition. If that proposition is intended to be universal, no support for it is to be found in *Grindley*, *Monkhouse*, *Doherty*, nor in any other case between 1819 and 1909.

[The LORD CHANCELLOR: The last three cases cited appear to justify completely the form in which Lord Coleridge left the issue to the jury in *Meade*.]

Yes, on the facts of that case.

[The EARL OF READING: Are not the words of Coleridge J. in *Monkhouse* important? He is dealing with a partial answer to the charge. He says: "It is not enough that he was excited or rendered more irritable unless (1) the intoxication was such as to prevent his restraining himself from committing the act in question, or (2) it took away from him the power of forming any specific intention." Those are two distinct things.]

Yes, and whether it be the first or the second, the effect is that a man in that condition is not responsible for his actions.

Cruse, 8 C. & P. 541: 1837; *Doody*, 6 Cox C. C. 463: 1854; *Horsey*, 3 F. & F. 287: 1862, were referred to.

Then there is a group of cases which stand by themselves, *e.g.*, *Whitmarsh*, 62 J. P. 711: 1898; and *Lumley*, 76 J. P. 208; 22 Cox C. C. 635: 1911, and similar cases where a woman has voluntarily submitted to a felonious act to procure abortion and died. It has been laid down that a jury may find manslaughter if the death is so remote a contingency that no reasonable

man would have taken it into consideration. Bigham J. in 1898 described it as an extraordinary view, and said that the jury could only reduce the crime to manslaughter if defendant as a reasonable man could not expect death to result, and the jury found wilful murder.

[The LORD CHANCELLOR: Are you aware of any case before *Meade* in which the addition of the test that the person accused should have known not merely that the act was wrong, but that the act was dangerous, was insisted upon?]

No, I am not. I submit that *Meade* ought to be limited to the class of case with which the Court of Criminal Appeal was then dealing, namely, acts of an ambiguous character where the question of intention arises. In *Galbraith*, 8 Cr. App. R. 101: 1912, the doctrine of *Meade* was not applied. The headnote of *Galbraith* is: "Drunkenness is not a good defence unless it can be positively proved that it was of such a nature that the accused did not know the difference between right and wrong."

[The LORD CHANCELLOR: That is exactly what the learned judge said in this case to the jury.]

It was one of the two alternatives that he offered.

Scholey, 3 Cr. App. R. 183: 1909, was referred to.

Drunkenness, as one of the judges said, is no excuse for crime, but there are crimes in respect of which drunkenness may afford a partial answer, and those are crimes where, the acts being of an ambiguous character, the prosecution must prove motive.

[VISCOUNT HALDANE: Why should *dementia* of a temporary kind produced by drink be in any different position from any other kind of *dementia?* In civil cases it is not. There is an immense deal of authority on drunkenness, and the effect has been to put it substantially on the same footing as any other form of madness. Why should it be different in the criminal law?]

If the question is, Ought a different test to be applied when you are considering the question whether the man is responsible or not? I submit a different test ought not to be applied. There

1920
1 *March.*

ARTHUR BEARD.

ought to be a no less exacting test, no fresh alternative, no further loophole for the drunkard. If the question is, What is the appropriate sequel to the finding of the jury? there is a difference. In the case of insanity the man is excused. It is different in the case of self-induced *dementia* of drunkenness. There the effect is not to get rid of the responsibility, but to diminish the responsibility to the extent of getting rid of the element of specific intention necessary to make the higher offence.

[The EARL OF READING: I have always understood the proposition to be that if the test is laid down to the jury, Did the man know what he was doing, or did he know the difference between right and wrong? and the jury answer in the accused's favour, he is acquitted of the crime, because the answer means that he cannot have a *mens rea*. Does not *Meade* mean that it is not a complete answer to the crime, not a defence, not an excuse, but the crime is reduced, because the jury have found that he did not intend the full natural consequences of his act? The presumption is rebutted. Is not that what is meant?]

Assuming that *Meade* applies to that limited class of case, that is what is meant. Was the man by reason of the liquor he had taken incapable of knowing that what he was doing was dangerous in the sense of being likely to inflict serious injury? He knew what he was doing.

[LORD ATKINSON: The law looks upon an insane person as incapable of committing a crime, but the law does not regard in the same light people who induce this insanity which arises in temporary drunkenness, but at the same time allows them, when intent is a necessary ingredient of the crime, to prove the absence of intent by the presence of drunkenness. It does not go beyond that. I have never heard the suggestion that a drunken man, be he ever so drunk, committing homicide was entitled to acquittal. If the man knows what he is doing, must not he be presumed to have the intent which the law implies from the acts of which he is accused?]

Drunkenness can never be more than a partial answer. It would be dangerous if it were open to a defendant who alleged intoxica-

1920
1 *March.*
ARTHUR BEARD.

tion to say: "True, I knew what I was doing, and I intended to do it. I knew it was wrong, but I did not think it would hurt so much."

The Court of Criminal Appeal stated that the appellant in this case was entitled to have the law stated to the jury as laid down in *Meade*. But that was not so. This case does not fall into the class of case to which *Meade* refers. The direction given by the learned judge in this case was right.

Crisp, 7 Cr. App. R. 173: 1912; *Honeyands*, 10 Cr. App. R. 60: 1914; *Mathieson*, 25 New Zealand Rep. 879: 1906; *W. Chapman*, 4 Cr. App. R. 54; larceny, and the Inebriates Act, 1898 (61 & 62 Vict. c. 60) s. 1 (1), were referred to.

On the whole matter it is submitted the judgment of the Court below should be set aside because it held (1) that the defendant was entitled to the advantage of the kind of summing-up which was commended in *Meade*, and (2) he was entitled to such a summing-up for the very reason that it was more favourable to a defendant alleging drunkenness than would be the summing-up proper to a case of insanity; (3) the judgment was wrong because it held that in the circumstances of this case Bailhache J. had not sufficiently directed the jury on the question of drunkenness. In my submission the learned judge did sufficiently direct the jury on that question. In view of the nature of the act that defendant was engaged on—rape, and the doing of an act in furtherance thereof—the only question, if question there could be, about his inebriety was, did he know what he was about? and in terms the learned judge put that to the jury, "Did he know what he was doing?" And he offered an alternative, "Did he know what he was doing was wrong?"

Further, the judgment appealed against assumes—wrongly—that the decision in *Meade* is of general application. If *Meade* meant what the Court of Criminal Appeal in this case assumed it meant, then *Meade* is wrong. It did not mark an epoch at all. It did not carry the law any further than it was previously. No decision during the previous half century would support *Meade* if *Meade* were intended to be of universal application. Limited to the class of cases where the question is, what was the intent in doing this violence? the decision in *Meade* is sound. The judgment of the Court of Criminal Appeal in the present case has assumed

1920
1 *March.*

ARTHUR BEARD.

the larger meaning for it, and has, nevertheless, upheld and approved it. Therefore that judgment ought to be set aside.

Artemus Jones, K.C. (with him *Austin Jones* and *Dallas Waters*) for the respondent. The contention now put forward by the Crown is inconsistent with the contention put forward by the Crown before the Court of Criminal Appeal. The issue there was whether Bailhache J. had followed the rule laid down in *Meade,* or whether he had applied the test in *McNaughton.* The Crown never impeached the validity of the rule in *Meade,* no doubt because it was binding on the Court of Criminal Appeal.

Three questions are raised—(1) Whether the direction of Bailhache J. was right or wrong in law; (2) Whether the rule in *Meade* is inconsistent or in conflict with the law as laid down in the previously decided cases; and (3) What should be the direction to be given to juries in future where the defence of drunkenness is pleaded.

The first stage in the history of the doctrine of drunkenness is from the days of Coke down to 1800. The origin of the rule is in Coke on Littleton, p. 247a, where he says: "As for a drunkard who is a *voluntarius daemon,* he hath (as hath beene said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." So in the beginning it was laid down that it was an aggravation of crime, and not even a qualified defence to it at all.

In Hale's Pleas of the Crown, Emlyn's edition, 1800, on p. 32 it says: "The third sort of *dementia* is that which is *dementia affectata,* namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it; but by the laws of England such a person shall have no privilege by this contracted madness, but shall have the same judgment as if he were in his right senses. (*Plowden,* 19a Crompt. Just. 29a.) But yet there seems to be two allays to be allow'd in this case: (1) That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink

such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him in the same condition in reference to crimes as any other phrenzy, and equally excuseth him. (2) That altho' the simplex phrenzy occasion'd immediately by drunkenness excuse not in criminals, yet if by one or more such practices an habitual or fixed phrenzy be caus'd tho' this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caus'd puts the man into the same condition in relation to crimes as if the same were contracted voluntarily at first. Now touching the trial of this incapacity, and who shall be adjudged in such a degree thereof to excuse from the guilt of capital offences, this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of the degrees of this infirmity, whereof some are sufficient and some are insufficient to excuse persons in capital offences. Yet the law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge."

Sir Michael Foster's dissertation on Treason and Homicide contains (p. 131) a useful passage on the origin of the rule.

The second stage in the history of the doctrine of drunkenness is from 1800 to 1835, when the doctrine begins to find its way into the law reports. (Lord Buckmaster referred to *Rennie*, 1 Lew. 76: 1825; burglary.) The word "excuse" is the cause of a good deal of misunderstanding and misconception on this branch of the law. My case here does not rest upon the use of the word "excuse." In this case the only issue in the trial was the issue between murder and manslaughter. The criterion is malice aforethought, and that involves an issue of fact which is for the jury. Foster, Crown Cases, p. 255, says: "I shall consider the law touching homicide under the following distinctions. It is either occasioned by accident, which human prudence could not foresee or prevent, or it is founded in justice or in necessity. Or it is owing to a sudden transport of passion which, through the benignity of the law, is imputed to human infirmity. Or it is founded in malice. Before I proceed to these matters I think proper to premise a few things. (1) In every charge of murder,

1920
1 *March.*

ARTHUR BEARD.

the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are so satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice until the contrary appeareth. And very right it is that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth; the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them. (2) In every case where the point turneth upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating the matter of fact, namely, whether the facts alleged by way of justification, excuse, or alleviation are true, is the proper and only province of the jury. But whether upon a supposition of the truth of facts such homicide be justified, excused, or alleviated must be submitted to the judgment of the Court; for the construction the law putteth upon facts stated and agreed, or found by the jury is in this, as in all other cases, undoubtedly the proper province of the Court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the Court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will find a general verdict conformably to such direction."

Counsel referred to cases cited by the Crown (above) and to *Her Majesty's Advocate* v. *Macdonald,* White's Justiciary Reports, vol. 2, 517: 1890; *Moore,* 3 C. & K. 319: 1852; and *Davis,* 14 Cox C. C. 563: 1881.

Bailhache J. declined to leave the issue to the jury in this case whether the placing of the hand over the mouth of the girl was a cause incidental to her death.

[LORD PHILLIMORE: It is no matter if you consider that he knew what he was about when he was ravishing the girl, and, reckless of consequences, put his hand upon her and so suffocated her, you may find him guilty of murder.

The EARL OF READING: That involves a fact—reckless of consequences.]

1920
1 *March.*
ARTHUR BEARD.

Is not that essentially an issue of fact? It is still left for the jury to say whether it was murder or manslaughter. It is for them alone to give a verdict on the facts. The rule is laid down that "the cause of death must be (1) of a homicidal character, or (2) of so obviously dangerous a kind that he must be presumed to have understood what he was doing," and it is hard to reconcile the cases with the contrary view. *Ladd*, 1 Leach, 96: 1773; and the note (by the editors) to the case of *Horsey*, 3 F. & F. 287: 1862; and *Fletcher*, 2 C. & K. 215, were referred to.

[LORD PHILLIMORE: The writer of the note has really misconceived *Ladd*.]

Luck, 3 F. & F. 483: 1862; and *Franz*, 2 F. & F. 580: 1861, were referred to.

The judgment in *Meade* does not enlarge the rule. It varies its terms for the purpose of adapting it to the particular set of circumstances. I accept what the Attorney-General said that it is a perfectly correct charge. The rule in *Meade* was the right one to apply in directing the jury in this case. The charge was one of murder, and intent is an essential ingredient of that crime.

[The LORD CHANCELLOR: If and so far as *Meade* is put forward as a code generally applicable and not merely as a rule limited to a particular class, can you support it?]

No, I cannot.

[The EARL OF READING: The Court of Criminal Appeal undoubtedly proceeded on the view that *Meade* laid down a rule which was binding upon that Court, and it did not consider the effect of that rule.]

Yes.

[The EARL OF READING: And Lord Coleridge J. who gave the first decision in *Meade* was a party to the decision in this case in the Court above. It was assumed, rightly or wrongly, that *Meade* was binding, and the sole question was whether *McNaughton* or *Meade* was the right test.]

1920
1 *March.*

ARTHUR BEARD.

I will not admit that the Court of Criminal Appeal was wrong in using the rule in *Meade*. The rule in *Meade* ought to have been applied at Chester, because intent was an essential ingredient of the crime.

The question whether the act of putting the hand on the mouth of the girl to stop her screaming came within the terms of Stephen J.'s direction in *Serné*, was an initial fact which ought to have been left to the jury. The defendant ought to have had the advantage of that point being fairly and clearly explained to the jury. Bailhache J. said that the facts as they stood clearly proved and established the rule that constructive murder applied, and, in effect, declined to leave that issue to the jury.

The rule laid down by Stephen J. in *Serné* was followed in the direction in the abortion cases, *e.g.*, *Lumley*, 76 J. P. 208: 1912; *Griffiths*, Liverpool Assizes, Oct. 30, 1913, reported in Kenny, Cases in Criminal Law, 61, 1914 ed.

[LORD BUCKMASTER: Is it admitted that there was sufficient evidence of drunkenness to require the judge to give the direction to the jury on the question?]

Yes.

[LORD BUCKMASTER: That being admitted, the extent of the evidence becomes wholly irrelevant, because that is for the jury to determine.

LORD PHILLIMORE: Was there any evidence of drunkenness fit to be left to the jury?]

There was very strong evidence with regard to drunkenness on the admission of the witnesses for the Crown themselves.

[The EARL OF READING: Supposing this House comes to the conclusion that the rule in *Meade* (using that as a term of compendious reference) has been taken to be of too wide an application and should be limited, and that a different direction should have been given, then the matter would have to go back to the Court of Criminal Appeal to decide whether or not under that direction there is any doubt what the verdict should be.]

Yes, I submit that is so.

[The LORD CHANCELLOR: Unless this House takes the view that the Court of Criminal Appeal was wrong in imagining that *Meade* governed it.]

The defence of drunkenness had been established long before the principle in *McNaughton* was decided, and there is nothing in the language of the judgments therein to warrant the idea that the test laid down was one for drunkenness. That test cannot possibly apply to the case of drunkenness.

It was submitted in the Court below that the statements made by the man at the Trade Union meeting negatived anything like the intoxication which we alleged. The answer is that in a crime of this description, it is a commonplace in works of medical jurisprudence, that once the wave of passion has gone over, a sort of mental reaction sets in.

It has never been laid down in any of the cases that the rule in *McNaughton* applies to cases of drunkenness. It applies only to cases of total insanity where insanity is in issue. The Crown is now contending that the rule applies to cases of drunkenness as well, but there is no principle of law on which they can justify that view and authority is to the contrary. The words of *Meade* were the right words to use here, because one of the essential ingredients in the crime of murder is the question of intent, and those words were relevant thereto. In fact, I submit that Lord Coleridge's direction in *Meade* was right.

Sir Richard Muir in reply. In Chitty's Criminal Law, published 1816, vol. 3, p. 725, it is said that "a temporary absence of reason produced by drunkenness is not in any case a legal excuse for the acts which it may occasion or excite." In none of the cases which have been cited has any real alteration of that general rule been shown. *Grindley* did not alter it. That was the summing-up of a single judge. The same judge, Holroyd J., decided the exact contrary in *Burrow*, and in *Rennie*. *Marshall*, 1 Lew. 76: 1830, is the first indication of any modification of the rule, then *Goodier*, *ib.*: 1831.

All the cases which deal with drunkenness may be summarised as follows. Where the presence or absence of a particular state

1920
1 *March.*

ARTHUR BEARD.

of mind of the accused must be established to constitute the crime charged, the drunkenness of the accused must be considered in ascertaining whether he had that state of mind and apprehension of an attack, so that the man might reasonably think he was acting in self-defence, is one of those. And that is *Marshall;* loss of self-control where there is legal provocation. Loss of self-control from provocation which does not amount to legal provocation, provocation by words which might drive a man almost out of his mind is no answer at all.

[LORD PHILLIMORE: You say that provocation by words, which would be no answer to the charge of manslaughter in the case of a sober man, would also be no answer in the case of a drunken man.]

Yes. Although the words might not have provoked a sober man, but would have provoked a drunken man, that makes no difference.

I submit that *Cruse* was quite correctly decided on both its branches. What Patteson J. says is: "If the child had died I would have directed that this is murder, because of the wicked, cruel act done, whether defendant intended to murder or not."

[The EARL OF READING referred to *Reniger* v. *Fogossa,* 1 Plowden, 19: 1562.]

That case is cited in Chitty's Criminal Law as one of the authorities for the old common law rule already referred to on "temporary absence of reason." All that Chitty means is that drunkenness is not insanity, and that a person who voluntarily makes himself drunk does not get the privilege of insanity. *Pearson,* 2 Lew. 144: 1835, was a case of homicide under sudden provocation. *John Thomas,* 7 C. & P. 817: 1837, was another instance of provocation. To ascertain the extent of the provocation on the mind of the killer you may look at his unsober condition. The practical test of finding out what is in a man's mind is different in the case of a man who is insane from that which it is in the case of a man who is drunk. In the latter case you never can have any evidence of what is in his mind. He may have a positive insane delusion to kill, but who is to tell you of it? It

1920
1 *March.*

ARTHUR BEARD.

is not a reasonable state of mind. When he is sober he has forgotten it all. No man who is so drunk as to think he was cutting a pig's throat when he was cutting a woman's would have sufficient recollection of it to give evidence in the box.

Now it is a common expression in the Court of Criminal Appeal that we must not criticise the summing-up "too minutely." It must be criticised in view of the facts the learned judge is actually deciding, and in view of the method in which the case was conducted, and especially if the defence put forward must be looked at as a whole.

[LORD DUNEDIN: There are two distinct points here. The first is whether the first direction to the jury about the drunkenness, that he must "not know what he was doing," and so on, was right. The second point, which is quite a different point, is whether that, for practical purposes, was vitiated by a maladroit illustration about mistaking a woman for a pig. The two points are quite different. There is also a different point which is whether it is right in dealing with drunkenness to use as a test words which are admittedly a test in cases of insanity.

VISCOUNT HALDANE: I am not satisfied that the illustration is such a misleading one that it was not a proper illustration. He says, if the man is so far gone as to think he is dealing with a pig instead of a woman, that is proof so complete of drunken *dementia* that you cannot convict him of murder, although you can convict him of manslaughter as consequential on his action in having got himself into that condition; but on the other hand, if you hold that he was such a brute, he was in so inflamed a condition that he did not know what he was doing merely in the sense that he was carried away by passion, that is no defence to a felony.

The EARL OF READING: The difficulty is that the jury who were considering how far drunkenness was a defence may have said, did this man think the woman was a pig, was he under that kind of delusion? And the answer at once is that nobody ever suggested that he was, and consequently, the only test which is put is one that must be answered against the defendant.]

1920
1 *March.*
ARTHUR BEARD.

The illustration would not mislead the jury because it was only given as an illustration of the state of mind of a man who does not know what he is doing, and does not know that he is doing wrong, a state of mind so oblivious to the real facts as, not that he would, but that he might, think that a woman was a pig. Although that would be a test of a delusion, it might also be a test of drunkenness, and therefore it would not be a misleading illustration. If the learned judge had stopped at "You must come to the conclusion, if you are to excuse him, that he must have been so drunk as not to know what he was doing, or that he was doing wrong," he would have been quite right. If he had left out his illustration he would have said substantially the same as Lord Coleridge in *Meade*. There is no reason why words appropriate to insanity should not be used if they illustrate the class of blankness of mind of a drunken man, which is necessary to excuse him from culpability. There is no reason why the language of *McNaughton* should not be used. It is conceivable that drunkenness might reduce the man to having delusions just as well as induce him to an absolute blankness of mind. But it is submitted that as long as the man is able to commit a crime of violence, it will never reduce his mind to a state of absolute blankness.

All the cases cited above, and in addition *Alexei Letenock*, 12 Cr. App. R. 221: 1917, were referred to.

The LORD CHANCELLOR: . . . . The Home Secretary has informed their Lordships that he has advised His Majesty that under all the circumstances of this case the capital sentence ought not in any event to be carried out. Otherwise their Lordships would not have thought it right to separate for the recess without reaching and delivering their conclusions.

T. W. M.

5 March.

The LORD CHANCELLOR (*a*): My Lords, Arthur Beard was convicted of murder at Chester Assizes, and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal

(*a*) This judgment is printed *verbatim*, and the arguments above are abbreviated, from a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

1920
5 March.
ARTHUR BEARD.

servitude. The case is brought to your Lordships' House under s. 1, sub-s. 6 of the Criminal Appeal Act, 1907, upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated. About 6 p.m., or a little later, on the 25th July, 1919, a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in the discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and, when she struggled to escape from him, he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some, but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems, to which this case has given rise, it requires examination. A witness met the prisoner on the 25th July, at 2 p.m., at a public-house, where they stayed together drinking for about twenty minutes. This witness states that the prisoner was then neither drunk nor sober. They proceeded together to a club where the prisoner purchased and brought away a bottle of whisky. Another witness, whose position was one of authority over the prisoner, saw him at 6.15 p.m. at the mill and found no indication that he was drunk. About twenty minutes to seven—that is, immediately after the offence had been committed—one Jones came to the mill to meet the prisoner. A few minutes before seven they went to another public-house and had some drink. The prisoner was then introduced for membership of a trade union; he answered, not unintelligently, certain questions which were put to him, and he was, upon the strength of such answers, accepted as a member. When the police came upon the scene in the early morning of the 26th July, they found him excited and under the influence of drink.

The prisoner was not called at the trial, but statements made by him were put in evidence. His first statement to the police officers was admittedly untrue and was concocted by him to explain the finding of the body of the girl. In his later statements he said

1920
5 *March.*

ARTHUR BEARD.

that he asked the girl to kiss him, and that he had a struggle with her and then seemed "to lose his senses," that he would not have injured the girl if he had not been "sodden and mad with drink," and that "it was the whisky that put the finishing touch to it." Counsel for the defence did not dispute the prisoner's criminal responsibility for the homicide of the girl. The only defence presented was that, in the circumstances proved, the verdict should be manslaughter, and not murder, on the ground that there was no intention on the part of the prisoner to cause the girl's death, and that he was in such a drunken condition that he was incapable of knowing that what he was doing was likely to inflict serious injury within the rule laid down by the Court of Criminal Appeal in *The King* v. *Meade*, 1909, 1 K. B. p. 895. Mr. Justice Bailhache carefully reviewed the evidence and gave the following direction of law to the jury: "It is no defence to say, 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this: Supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says, 'I was mad, and turned into a brute by drink,' it is no defence, unless he satisfies you that he was so far out of his senses that he did not know what he was doing." The jury after a very brief consideration returned a verdict of murder.

In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner: (1) that the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional, but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (2) that the learned judge wrongly directed the jury on the defence of drunkenness, and gave a direction which was not in accordance with the decision in *Meade's* case, and was applicable only to the defence of insanity. The first objection failed, the Court being of opinion (apart from the de-

fence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordship's House to displace this view of the law, and there can be no doubt as to its soundness. With regard to the second objection, the Court of Criminal Appeal, holding itself bound, by previous decisions of its own, to the view that *The King* v. *Meade* laid down a general code, came to the conclusion that the learned judge had given a direction which was calculated to mislead the jury by imposing a test applicable only to the defence of insanity, instead of the test, imagined to be generally laid down in *Meade's* case, for application to the defence of drunkenness. The Court was not satisfied that the verdict would have been the same if the proper direction had been given, and substituted a verdict of manslaughter for that of murder.

The appeal to your Lordships' House from this decision raised questions of undoubted importance in the administration of the criminal law. In crimes of violence resulting in death or serious injury it often occurs that the accused is proved to have been drunk or under the influence of drink when he committed the offence; and judges have frequently to direct juries on the principle upon which they must approach the defence of drunkenness. The language used by judges has varied, and different directions are not always easy to reconcile. In *Meade's* case the authorities were reviewed by the Court of Criminal Appeal, and a rule was laid down which has been treated as general and authoritative by judges of first instance, and by the Court of Criminal Appeal, both in earlier cases and in the present case. It has been contended before your Lordships that whilst the decision in *Meade's* case may have been right upon the facts there proved, it is an authority of limited and not of general application; that in its limited application *Meade's* case did not affect the present case, and that consequently there was no misdirection. It becomes necessary, in view of this contention, to consider the state of the law before *Meade's* case and to examine the authority of this decision.

Under the law of England as it prevailed until early in the nineteenth century voluntary drunkenness was never an excuse

1920
5 March.

ARTHUR BEARD.

for criminal misconduct; and, indeed, the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was in terms based upon the principle that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man. An early statement of the law is to be found in *Reniger* v. *Fegossa*, 1 Plowden, 19, 1551 [Cam. Scacc.]: "if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be priviledged thereby." In Hale's Pleas of the Crown, vol. 1, page 32, the learned author says: "This vice [drunkenness] doth deprive men of the use of reason and puts many men into a perfect but temporary frenzy; and therefore, according to some civilians, such a person committing homicide shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness than the crime committed in it; but by the laws of England such a person shall have no privilege by this voluntary contracted madness but shall have the same judgment as if he were in his right senses." To the same effect is the passage in Hawkins's Pleas of the Crown, B. I., ch. 1, section 6: "He who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober." Coke upon Littleton, 247A, similarly treats drunkenness as an aggravation of the offence. "As for a drunkard who is *voluntarius daemon* he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." Blackstone, in his Commentaries, volume 4, page 26, has a passage to the same effect: "As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour." Judicial decisions extending over a period of nearly one hundred years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time

1920
5 *March.*

ARTHUR BEARD.

be affiliated upon a single or very intelligible principle. The case of *R.* v. *Grindley*, which was tried at Worcester Assizes in the year 1819, was the first reported judicial decision "that drunkenness put forward as a defence to a charge of crime was a circumstance proper" to be taken into consideration. It was there held by Mr. Justice Holroyd that although voluntary drunkenness cannot excuse from the commission of a crime, yet where upon a charge of murder the material question is whether an act was premeditated or done only in the stress, heat or impulse of the moment, the fact of the party being intoxicated was a circumstance proper to be taken into consideration. (Russell on Crimes, 7th edition, volume 1, page 88, note b.) But this case cannot now be regarded as an authority. Mr. Justice Park, after referring to it in *R.* v. *Carroll*, 7 C. & P. page 145, 1835, said that Mr. Justice Holroyd had retracted the opinion expressed in that case, and he added that there was no doubt that that case was not law. With this view Mr. Justice Littledale agreed. The language used by Mr. Justice Holroyd as reported is capable of wide application and perhaps justified the observation made by Mr. Justice Park that there would be no safety for human life if it were law.

In examining the language used in these and later cases it is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing *in abstracto* a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury. In *Burrows's* case, 1 Lewin, page 75, 1823, and in *Rennie's* case, 1 Lewin, page 76, 1825, Mr. Justice Holroyd assumed that drunkenness could not be taken into consideration as a defence to a criminal charge unless the derangement which it caused became fixed and continuous because the drunkenness itself was habitual. The information in these cases, both as to the facts and as to the defence, is very meagre. In the one case the prisoner urged that he was in liquor, and in the other he pleaded in mitigation that he was drunk. Little can be derived from these reports save that the learned judge declared that only habitual drunkenness causing continuous insanity could be a defence. In *Marshall's* case, 1 Lewin, page 76, 1830, Mr. Justice Park was of opinion that upon an indictment for stabbing the jury might take into their consideration, among other circum-

1920
5 *March.*

ARTHUR BEARD.

stances, the fact of the prisoner being drunk at the time in order to measure the apprehension of attack under which it was alleged that the prisoner acted. In 1831 the same learned judge is reported to have given a similar direction in *Goodier's* case, 1 Lewin, page 76. In 1835, *Pearson's* case, 2 Lewin, page 144, upon an indictment for murder, the defence was that the prisoner was drunk. He had beaten his wife to death with a rakeshank. Mr. Justice Park said: "Voluntary drunkenness is no excuse for crime . . . drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation." In these last-mentioned cases Mr. Justice Park treats the drunken condition of the accused as relevant in considering either the extent of the apprehension in the mind of the accused of attack, or the effect upon him of sudden provocation. This class of case was discussed more fully by Baron Parke in *R.* v. *Thomas*, 7 C. & P. page 817, 1837, when he expressed a view of the circumstances under which the law on provocation might justify a verdict of manslaughter instead of murder. The judgments, however, in these cases diverged into topics not specially helpful in the matter now under debate. In *R.* v. *Meakins*, 7 C. & P. page 297, 1836, Baron Alderson directed the jury that in the case of stabbing with intent to murder, where the prisoner had used a deadly weapon, the fact that he was drunk could not alter the nature of the case. The learned Baron expressed the opinion to the jury that "if a man use a stick you would not infer a malicious intent so strongly against him if drunk when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, would produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party." The learned Baron's view was that drunkenness might affect the jury's view of the intent, but that the use of the deadly weapon in that case shewed the malicious intent so clearly that the drunkenness of the accused could not alter it. In *R.* v. *Cruse*, 8 C. & P. page 546, 1838, on an indictment for assault with intent to murder, Mr. Justice Patterson directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet may be guilty of very great

1920
5 *March.*

ARTHUR BEARD.

violence. This direction was examined in *R.* v. *Monkhouse*, 4 Cox's Criminal Cases, p. 56, 1849, by Mr. Justice Coleridge and Baron Rolfe on an indictment for wounding with intent to murder. Mr. Justice Coleridge agreed with the substance of Mr. Justice Patterson's direction, but had some doubt about the language. After stating that it is a general rule in criminal law that juries are to presume a man to do what is the natural consequence of his act, Mr. Justice Coleridge said: "If the defendant is proved to have been intoxicated the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged? . . . drunkenness is ordinarily neither a defence nor an excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention." Here, again, the appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming the intent charged, that is, the intent to murder. The words "unless the intoxication was such as to prevent his restraining himself from committing the act in question" are not to be found in any other judicial direction, and cannot in my view be explained unless they were unscientifically used with the object of indicating the defence of insanity. In *R.* v. *Stopford*, 11 Cox's Criminal Cases, p. 643, 1870, on an indictment for wounding with intent to do grievous bodily harm, Mr. Justice Brett said: "If he was merely so drunk as to put himself in a passion drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing." The question was whether the prisoner had formed the intent to murder, and this was answered, in the opinion of the learned judge, if the jury thought that his drunken condition rendered him incapable of forming the intention.

Next in order we reach the important case of *R.* v. *Doherty*, 16 Cox's Criminal Cases, p. 306, 1887, tried by Mr. Justice Stephen on an indictment for murder, where the question was whether the verdict should be murder or manslaughter. This eminent authority on criminal law said: "Although you cannot take drunkenness as an excuse for crime, yet when the crime is

1920
5 *March.*

ARTHUR BEARD.

such that the intention of the party committing it is one of its constituent elements you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime." The learned judge then pointed out that if a drunken man formed an intention to kill another or to do grievous bodily harm to him and killed him, his drunken intention made him as guilty of murder as if he had been sober. But if his drunkenness prevented his forming such an intention he would only be guilty of manslaughter. If he had not formed such an intention then he had not committed murder, that is, unlawful homicide with malice aforethought. The learned judge then explained that "aforethought" did not necessarily imply premeditation, but that it did imply an intention which must precede the act intended. "What then is the intention necessary to constitute murder? Several intentions would have this effect, but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death, the firing of the pistol, was done with either of those intentions, Doherty's crime was murder." The same learned judge discussed the meaning of "malice aforethought" in *R.* v. *Serné*, 16 Cox's Criminal Cases, page 311, 1887, and there pointed out that these words are technical and must be construed not according to the ordinary interpretation of language, but according to a long series of decided cases which have given to them a somewhat artificial sense.

Notwithstanding the difference in the language used, I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was only committed if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime, but that the state of drunkenness may be incompatible with the actual crime charged, and may, therefore, negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by

1920
5 *March*

ARTHUR BEARD.

reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But, nevertheless, unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter. (*Per* Mr. Justice Stephen in *Doherty's* case, 16 Cox's Criminal Cases, page 307.) This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself, the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

The conclusions to be drawn from these cases may be stated under three heads:

(1) That insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention has been preserved throughout the cases. The insane person cannot be convicted of a crime (*R.* v. *Felstead*, 1914, A. C. 534), but, upon a verdict of insanity, is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. In the early cases of *Burrows* (1823) and *Rennie* (1825, 1 Lewin, pages 75 and 76, Mr. Justice Holroyd refused to regard drunkenness as an excuse unless it had induced a continuing and lasting condition of insanity. But in *R.* v. *Davis*, 14 Cox's Criminal Cases, page 563, 1881, where the prisoner was charged with wounding with intent to murder, Mr. Justice Stephen thought (and I agree with him) that insanity, even though temporary (*a*), was an answer. The defence was that

(*a*) But cf. *Ethel Harding*, 1 Cr. App. R. at 223: 1908,

1920
5 *March.*

ARTHUR BEARD.

the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from *delirium tremens* resulting from over-indulgence in drink. Mr. Justice Stephen said: "But drunkenness is one thing and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. . . . If you think there was a distinct disease caused by drinking, but differing from drunkenness and that by reason thereof he did not know that the act was wrong you will find a verdict of not guilty on the ground of insanity." To the same effect is a decision of Mr. Justice Day in *R.* v. *Baines*, Taylor's Medical Jurisprudence, 6th edition, volume I., p. 898; *The Times*, January 25th, 1886. The defence was that the prisoner was insane when the murder was committed. The evidence proved that the prisoner had on several occasions been under treatment for *delirium tremens*. He had one attack a week before, and another two days after, committing the crime. Mr. Justice Day held that it was immaterial whether the insanity was permanent or temporary. The question was whether there was insanity or not; and the learned judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity.

(2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

(3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *R.* v. *Meade*, 1909, 1 K. B. 895. The prisoner was charged with murder. He brutally ill-treated the deceased woman during the night of her death; broke a broomstick over

1920
5 March.

ARTHUR BEARD

her, and struck her a violent blow with his fist, rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter. Mr. Justice Coleridge directed the jury in the following terms: "In the first place, every one is presumed to know the consequences of his acts. If he is insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive (meaning intent) shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is obscured by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter." The objection raised in the Court of Criminal Appeal was that the summing up led the jury to believe that to justify a verdict of manslaughter they must find that the prisoner was insane or in a state resembling insanity, whereas the direction should have been that if there was absence of intention in fact it was manslaughter. Mr. Justice Darling, in delivering the judgment of the Court, reviewed many of the authorities that were cited to your Lordships, and came to the conclusion that the judges by these decisions had attempted to express the doctrine that, where intent is of the essence of the crime charged, the intent may be disproved by shewing that the prisoner was in a condition of drunkenness which made him incapable of forming the intent. The learned judge said: "We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man, in many ways; (2) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted." The learned judge then expressed the conclusion of the Court that, on a true construction, the language used by Mr. Justice Coleridge did not differ from this rule. The language of the Court of Criminal Appeal contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with a crime of violence may shew, in order to

1920
5 *March.*

ARTHUR BEARD.

rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous. The Court of Criminal Appeal in the present case, notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this doctrine, and that the jury should have been directed to consider whether Beard at the time of placing his hand on the child as described was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury.

Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and, I apprehend, can have no doubt that the proposition in *Meade's* case in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act. In this respect the so-called rule differs from the direction of Mr. Justice Coleridge, which is more strictly in accordance with the earlier authorities. Consideration of the judgment, and particularly of Mr. Justice Darling's observations that the Court did not wish to extend the ambit of its decision beyond that laid down in the older cases, makes it clear that it was not intended to lay down a rule which should be applied to such a case as the present. In *Meade's* case the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent; in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape. I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime, e.g., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the

1920.
5 March.
ARTHUR BEARD.

particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is, for example, in a charge of attempted suicide. In *R.* v. *Moore*, 3 C. & K. page 319, 1852, drunkenness was held to negative the intent in such a case, and Chief Justice Jervis said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" My Lords, drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

Lastly, I come to the actual direction of Mr. Justice Bailhache. It was not a satisfactory direction. The Court of Criminal Appeal held that the learned judge had misdirected the jury because he applied the test of insanity to a case of drunkenness which *a concessis* did not amount to insanity. This distinction, as already shewn, has been preserved throughout the cases. And it ought to be so preserved, for the result of a verdict of insanity is not a conviction. That the test suggested by the learned judge is one that would properly be applied in a case of insanity is plain. The questions put: Did the person know what he was doing? or, if not, did he know that he was doing wrong? are in accordance with the opinions expressed by the judges in *McNaghton's* case, 4 St. Trials (N.S.), page 849, 1843; and, in combination with the question whether the prisoner knew what he was doing, the very ambiguous illustration given by Mr. Justice Bailhache of the meaning that should be attributed to these questions would remove all doubt, if any existed, of the point at which his mind went astray. It is an illustration of a delusion assailing the mind of an

1920
5 *March.*

ARTHUR BEARD.

insane person, and it is arguable that the impression conveyed to the jury may have been that they could only find a verdict of manslaughter if they found that Beard was the victim of such delusions. As this suggestion had never been made, the effect of such a direction may be made the subject of infinite conjecture. In *Meade's* case the Court of Criminal Appeal approved Lord Coleridge's direction because he had sufficiently warned the jury that there was no plea of insanity, and that it was not the defence raised. This warning is absent from Mr. Justice Bailhache's direction, and the questions as framed might conceivably (so it is argued) have led the jury to think that insanity was the test. Neither should the learned judge, in my opinion, have introduced the question whether "the prisoner knew that he was doing wrong" in a defence of drunkenness, where insanity was not pleaded. It is a dangerous and confusing question to put to a jury, for a drunken man's judgment upon such a question is very likely to be impaired, and it might well be perplexing to a jury to determine whether, if he knew what he was doing, he knew also that he was doing wrong. The general proposition that drunkenness is no excuse for crime may be seriously affected in its operation if such a question is to be a test by which the jury may determine whether the verdict should be murder or manslaughter. It is noteworthy that, notwithstanding that the judges ever since *McNaghton's* case in 1843 have had these questions in mind as the test of insanity, there is no single case, known to me, where drunkenness has been the defence, in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there existed insanity caused by drink. I look upon the direction of Mr. Justice Bailhache as an innovation which is not supported by authority, and which should not be repeated or imitated. But while I think that the summing up was in some respects unhappily conceived, I am not prepared, reading it as a whole, to hold in this case that it amounted to, or should be treated as, a misdirection. The defence which is founded upon insanity is one thing. The defence which is founded upon drunkenness is another. The relevant considerations are not identical. It is inconvenient to use the same language in charging juries in relation to different defences. But the portions of the summing up, which I have criticised, were in fact

1920
5 *March.*

ARTHUR BEARD.

unduly favourable to the prisoner. He cannot complain of them unless they so confused the jury as to prevent it from properly appreciating the true issue, and I am not prepared to lay it down —though I have felt some doubt upon the point—that the actual direction given to the jury by Mr. Justice Bailhache disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that, upon the whole, the matter was so presented to them, though unscientifically, that they have in fact formulated the answer which is decisive even in a case where the defence is founded upon drunkenness.

In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape. In these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder. I am, therefore, of opinion that the appeal should be allowed and the conviction of murder restored, and I move your Lordships accordingly.

My Lords, I have only to add that my noble and learned friend Lord Buckmaster has desired me to say that he concurs in the judgment I have just read to your Lordships.

The other noble and learned Lords concurred.

Question put: That the Order appealed from be reversed.

The Contents have it.

The SOLICITOR-GENERAL: The actual Order made in a previous case which came to your Lordships' House was this: "That the Order of the Court of Criminal Appeal be reversed and the cause remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this judgment."

Solicitors for Respondent—*Haslam & Sanders* for *Henry Bostock*, Hyde, Cheshire.

COURT OF CRIMINAL APPEAL.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE AVORY.

1920.
15 *March.*

ARTHUR BEARD.

Sir Richard Muir for the Crown. I move the Court, pursuant to the decision of the House of Lords, for an Order dismissing the appeal in this case.

The motion was granted.

Appeal dismissed. Conviction restored.

T. W. M.

INDEX.

ACCOMPLICE,
corroboration of, 1.

ADJOURNMENT
of trial, 41.

ADMISSIONS,
police must not elicit, 23.

"ADVERTISEMENT,"
within Venereal Diseases Act, 77.

"ADVICE,"
within Venereal Diseases Act, 77.

ALIEN. *See* EXPULSION.

ALIBI,
defence of, direction on, 28.

AMENDMENT
of information, 121.

APPEAL,
against sentence, on, respondent not entitled to be heard, 121.
ground of, added by leave of Court, 59.
on suggestion of Court, 141.

APPELLANT,
not a witness below, 14.

APPLICATION FOR LEAVE TO APPEAL,
on, all the facts must be disclosed, 124.
under s. 9 (d) of Criminal Appeal Act, 153.

ATTORNEY. *See* POWER.

"BAD CHARACTER," &c.,
cross-examination on, refers to time of trial, 149.

BAIL,
granted by the Court, 76, 83.

BORSTAL TREATMENT, 15, 37, 38, 84.
for first offence, 24.
in prisons, 65—9.

BREACH OF WARRANTY,
indictment on, 9.

CERTIFICATE,
appeal on, 26.

CHARACTER,
evidence of, what is, 95—9.

CHARGE
of a human being under power of attorney, 58.

CO-DEFENDANTS
in conspiracy. *See* CONSPIRACY.
may incriminate each other, 155.

CONCURRENT SENTENCES. *See* SENTENCES VARIED.

CONSORTIUM,
in law, 19, 21.

CONSPIRACY,
direction in, 28.

"CONSTRUCTIVE" MURDER, 110.

CONVICTIONS QUASHED ON THE GROUND OF
co-defendant's being quashed, 3, 32.
cross-examination, improper, 87.
evidence being insufficient, 58, 74.
excluded, 82, 85, 119.
joint defendants' cases not being distinguished, 7, 24, 31, 71.
misdirection, 7, 13, 18, 31, 33, 58, 71, 86, 101, 117.
mistake in law, 19, 87.
non-direction, 18, 158.
questions to defendant by the judge, 95.
summing up being defective, 158.

CONVICTIONS RESTORED, 200.
varied, 6, 117.

CORROBORATION
by non-denial, 1.
in rape, 74—6, 81—3.

COUNTS,
no verdict on certain, 83.

CRIMINAL
responsibility and intoxication. *See* INTOXICATION.

CROSS-EXAMINATION
letting in a report, 44.
of one co-defendant to incriminate another, 155.

DEFENCE,
course of, after submission of "no case," 17.
of intoxication, effect of, 159.
insanity, effect of, 159.

DEFENDANT,
out of sight of witness at trial, 128.

DEPOSITION,
repudiated at trial, effect of, 131.

DISCHARGE-BOOK,
whether evidence of character, 95.

EPILEPSY AND INSANITY, 48—56.

EVIDENCE,
excluded, effect of, 85.
of untrue statements in forged documents, 101.

EXAMINATION,
surgical, of appellant, 152.

EXPULSION,
recommendation of, considered, 130.

FALSE PRETENCES,
obtaining by, through breach of warranty, 9.

FIAT OF ATTORNEY-GENERAL,
appeal on, 159.

FORGED INSTRUMENT,
direction on defendant's knowledge of, 101.

FRESH EVIDENCE
heard, 5.
on Borstal system, 66.
on insanity, 49.
general rule about, 48.

HABITUAL CRIMINAL,
conviction for being, quashed, 119, 148.
two convictions as, effect of, 141.

"HONEST WORK,"
period of, 118, 148.

HOUSE OF LORDS
reversing C. C. A., 199.

HUSBAND AND WIFE,
larceny from each other, 9, 32.

INFORMATION,
amending, 121.

INSANE DEFENDANT
should plead unfitness, 48.

INSANITY
and epilepsy, 48—56.
intoxication, 159.

INTENT AND INTOXICATION, 159.

INTENT TO DEFRAUD
by forged instrument, by person entitled to the proceeds, 101.

INTOXICATION
and criminal responsibility, 159, 184—199.

JOINT INDICTMENT. *See under* CONVICTIONS QUASHED.

JUDGE'S
discretion to adjourn in order to call witness, 41.
interrogation of defendant, 95.
view (at trial), effect of, above, 122.

JURY,
minority of, judge's remarks to, 109.
questions of, to judge, 105.

LIMITATION OF TIME,
statutory, true view of, 121.

"LIVING TOGETHER,"
in s. 36 of the Larceny Act, 1916, meaning of, 19.

MEDICAL REPORT,
when let in as evidence, 44.

MISDIRECTION. *See under* CONVICTIONS QUASHED.
in conspiracy, 26.
forgery, 101.

MODIFIED BORSTAL SYSTEM, 65—9.

MURDER,
conviction for, varied, 117.
of unborn child, incitement to, 26.
reduction of, to manslaughter, 110.

NO CASE TO GO TO THE JURY,
submission of, 17.

NON-DIRECTION
amounting to misdirection, 158.

OBJECTION
to evidence must be taken at time of tendering, 9.

ONUS
in receiving cases. *See* RECEIVING.

"OTHER STOLEN PROPERTY,"
direction on, 57.

"PERSON,"
within 24-5 V. 100, 4...26.

PHOTOGRAPHS
of suspects, use by police of, 8.

POLICE
should not elicit admissions, 23.

POWER OF ATTORNEY
and criminal responsibility, 58.

PREVENTIVE DETENTION,
not necessarily imposed, 141.

"PROSECUTOR,"
within s. 1 f (ii) of the Criminal Evidence Act, 87—94.

PROVOCATION,
evidence of, should not be excluded, 85.

QUESTIONS
to defendant by judge, 95.
judge by jury, 105.

RAPE,
corroboration in, 74—6, 81—3.
death through, 110.

RECEIVING
with guilty knowledge, *onus* of proof in, 11, 33.

REFERENCE
by Home Secretary, 33.

SENTENCE,
appeal against, respondent not heard on, 126.
not running from date of conviction, 124.
of death set aside, 117.
to Borstal institutions, 84.
second division, on appeal, 126.

SENTENCES
quashed, 132.
reduced on the ground of—
age, 35, 41, 58, 74.
Borstal treatment not suiting, 69, 100.
conviction varied, 6, 117.
meritorious military service, 100, 103, 123, 138, 148.
no previous conviction, 3, 58.
penal servitude, 35.
reparation, 36.
severity, for bigamy, 107, 127, 133.
indecent assault, 151.
larceny, 120.
varied, 25, 37, 38, 70, 80, 119.

SILENCE,
corroboration, 2.

SUBSEQUENT OFFENCE
to that tried. *See* "BAD CHARACTER."

SURGICAL EXAMINATION,
application for, 152.

UNBORN CHILD,
murder of, 26.

VERDICT,
no, on some counts, 83.

WITNESSES
adjournment to call, 41.
not called at the trial, 4.
(appellant) . . . 14.
not visible by defendant, 128.

Photographed from the only available copy of the original edition and reprinted by Photo-Lithography in Great Britain at The Haycock Press Ltd., London.

BIBL. LONDIN. UNIV.